(22,326)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 140.

CHARLES L. ROSS, PLAINTIFF IN ERROR,

vs.

MINERVA STEWART.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

	Original.	Print
Caption	*a*	1
Return to writ of error	*b*	1
Statement of costs	*c*	1
Citation and service thereof	1	1
Application for allowance of writ of error	2	2
Order allowing same	3	3
Assignment of errors	4	3
Supersedeas bond	6	5
Writ of error	8	6
Petition in error	10	7
Exhibit A—Record in district court	13	8
Petition of Watts & Curtis to be made parties defendant	13	8
Demurrer to petition	15	9
Record entry: Judgment	16	10
Record entry: Docket entries	18	11
Amended petition	19	11
Clerk's certificate	24	15
Order allowing time to file brief	26	15
Order of submission	27	16
Judgment	28	16
Opinion	29	16
Clerk's certificate	44	24

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1912

a No. 349.

CHARLES L. Ross, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

Writ of Error to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma.

b In the Supreme Court of the State of Oklahoma.

Return to Writ of Error.

In obedience to the within writ of error I herewith transmit a full, true and complete transcript of the record and all proceedings had in the Supreme Court of the State of Oklahoma in cause No. 349, Charles L. Ross, Plaintiff in error, vs. Minerva Stewart, Defendant in error.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court of the State of Oklahoma, at Guthrie, this 20th day of September, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of the State of Oklahoma.
By W. M. BONNER, *Deputy.*

c In the Supreme Court of the State of Oklahoma.

No. 349.

CHARLES L. Ross, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

To costs in the Supreme Court of Oklahoma.....	$16.50
To preparing transcript for Supt. Ct. U. S.	$25.50
	$42.00

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above is a true statement of the costs in the Supreme Court of Oklahoma in the above entitled cause.

In witness whereof, I hereunto set my hand and affix the seal of said court, at Guthrie, this 20th day of September, 1910.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By W. M. BONNER, *Deputy.*

1 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Minerva Stewart, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein Charles L. Ross is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma this 14 day of September, 1910.

JESSE J. DUNN,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSE PARDOE, *Deputy.*

Service of the foregoing citation is acknowledged on September, 17, 1910.

MINERVA STEWART,,
By E. H. STREET, *Attorney.*

[Endorsed:] No. —. Charles L. Ross, Pl'tff in Error, v. Minerva Stewart, Def't in Error. Citation. Filed Sep. 20, 1910. W. H. L. Campbell, Clerk.

2 In the Supreme Court of the State of Oklahoma.

No. 349.

CHARLES L. ROSS, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

Application for Allowance of Writ of Error.

Charles L. Ross represents that on the 11th day of January, 1910, the Supreme Court of the State of Oklahoma, rendered a final judgment in the above entitled cause affirming the action of the District Court of Sequoyah County, Oklahoma, theretofore had and

rendered, in sustaining a demurrer to the petition of the plaintiff below, plaintiff in error in the Supreme Court, and dismissing the plaintiff's cause at his cost; and he further represents that in said judgment of said Supreme Court, as well as in the judgment of the lower court, there were manifest errors to the prejudice of this plaintiff in error, and this plaintiff in error, to the end that full and complete justice may be done him, prays for an order allowing him to prosecute a writ of error to the Honorable Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which he shall give and furnish upon said writ of error by way of a cost bond. And he further states that in said cause he did specially claim a title, a right, a privilege, and an immunity under a statute of the United States and the Constitution of the United States and a treaty of the United States, and that the decision was against his right to set up
3 and claimed; and he says that he herewith presents his assignment of errors alleged to have been committed by the said Courts and intended to be urged in the prosecution of said suit in error.

CHARLES L. ROSS,
By W. H. KORNEGAY, *Attorney.*

Let a writ of error issue in the above cause and the cost bond be fixed at $200.00.

This 13th day of August, 1910.

JESSE J. DUNN,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
[SEAL.] W. H. L. CAMPBELL,
Clerk Supreme Court,
By JESSE PARDOE, *Deputy.*

(Filed August 13, 1910, W. H. L. Campbell, Clerk.)

Endorsed: No. 349. Charles L. Ross, Plaintiff in Error, vs. Minerva Stewart, Defendant in Error. Application for Allowance of Writ of Error. Filed August 11, 1910. W. H. L. Campbell, Clerk.

4 In the Supreme Court of the State of Oklahoma.

No. 349.

CHARLES L. ROSS, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

Assignment of Errors.

The plaintiff in error makes the following assignment of errors upon which he will rely upon his prosecution of the writ of error

to the Supreme Court of the United States in the above entitled cause from the judgment rendered by the Supreme Court of the State of Oklahoma on the 11th day of January, 1910, affirming the judgment of the District Court of Sequoyah County, Oklahoma, and he says:

I.

That the District Court of Sequoyah County, Oklahoma, erred in sustaining the demurrer to his petition and in holding and deciding that the facts stated therein were not sufficient to constitute a cause of action, and the Supreme Court of the State of Oklahoma erred in affirming said judgment.

II.

That the District Court of Sequoyah County, Oklahoma, erred in dismissing the case of the plaintiff, and the Supreme Court of the State of Oklahoma erred in affirming said judgment of dismissal.

III.

That the District Court of Sequoyah County, Oklahoma, erred in rendering a judgment against the plaintiff for costs, and the Supreme Court of the State of Oklahoma erred in affirming said judgment.

IV.

That the District Court of Sequoyah County, Oklahoma, erred in sustaining the demurrer to the plaintiff's petition and in dismissing the case at the cost of the plaintiff, and the Supreme Court of the State of Oklahoma erred in affirming such judgment.

And the plaintiff in error says that all the things complained of in Assignments No. 1, 2, 3 and 4 took place over his objection and exception and to his damage.

Wherefore, The plaintiff in error prays that the judgment of the District Court of Sequoyah County, Oklahoma, be reversed and that the judgment of the Supreme Court of the State of Oklahoma affirming the same be reversed, and that such directions be given and that the petition of plaintiff in error be held to constitute a cause of action against the defendant in error.

CHARLES L. ROSS,
Plaintiff in Error,
By W. H. KORNEGAY,
His Attorney.

[Endorsed:] No. 349. Charles L. Ross, Pl'tiff in error, v. Minerva Stewart, Def't in error. Assignment of Errors. Filed Aug. 11, 1910. W. H. L. Campbell, clerk.

6 In the Supreme Court of the State of Oklahoma.

No. 349.

CHARLES L. ROSS, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

Cost Bond.

Know all men by these presents:

That we, Charles L. Ross, as principal, and Oliver Bagby, of Vinita, Oklahoma, and John S. Thomason, of Vinita, Oklahoma, as sureties, are held and firmly bound unto the above named Minerva Stewart in the sum of two hundred dollars ($200.00), to be paid to her, and for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 15th day of August, in the year of our Lord one thousand nine hundred and ten.

Whereas, the above named Charles L. Ross, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void; otherwise, to remain in full force and virtue.

CHARLES L. ROSS,
By W. H. KORNEGAY, *Attorney.*
OLIVER BAGBY.
JOHN S. THOMASON.

7 STATE OF OKLAHOMA,
County of Craig, ss:

Oliver Bagby, one of the sureties in the foregoing bond, being duly sworn, says, that he is a resident and freeholder of the State of Oklahoma and resides in Craig County, and that he is worth, above all just debts and liabilities in property not by law exempt from execution in the State of Oklahoma, the sum of $2500.00.

OLIVER BAGBY.

Subscribed and sworn to before me this 17th day of August, 1910.

[SEAL.] CHAS. H. COLLINS,
Notary Public.

My Commission expires May 16, 1914.

STATE OF OKLAHOMA,
County of Craig, ss:

John S. Thomason, one of the sureties in the foregoing bond, being duly sworn, says, that he is a resident and freeholder of the State of Oklahoma and resides in Craig County, and that he is worth, above all just debts and liabilities in property not by law exempt from execution in the State of Oklahoma, the sum of $2500.00.

JOHN S. THOMASON.

Subscribed and sworn to before me this — day of August, 1910.

[SEAL.] CHAS. H. COLLINS,
Notary Public.

My commission expires May 16, 1914.

This bond approved this 26th day of August, A. D. 1910.

JESSE J. DUNN,
Chief Justice of the Supreme Court of the State of Oklahoma.

Endorsed: No. 349. Charles L. Ross, Plaintiff in Error, vs. Minerva Stewart, Defendant in Error. Cost bond. Filed August 26, 1910. W. H. L. Campbell, Clerk.

8 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Oklahoma before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Charles L. Ross, plaintiff in error, and Minerva Stewart, defendant in error, wherein rights, privileges and immunities are claimed under the Constitution and statutes of the United States, and under authority exercised under the United States, and the decision was against the rights, privileges and immunities specially set up or claimed under such Constitution, statutes and authority, a manifest error has happened, to the great damage of the said Charles L. Ross, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you may have the same at Washington within thirty days from the

date hereof in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and
9 & 10 customs of the United States should be done.

Witness the Honorable John Marshall Harlan, Associate Justice next in precedence to the Chief Justice of the Supreme Court of the United States, the 10 day of September, in the year of our Lord one thousand nine hundred and ten.

[The Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,
Clerk of the Circuit Court of the United States for the Western District of Oklahoma.

Allowed by
JESSE J. DUNN,
Chief Justice of the Supreme Court of the State of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

[Endorsed:] No. 349. Charles L. Ross, plff. in error, vs. Minerva Stewart, Deft. in error. Writ of Error. Filed Sep. 14, 1910. W. H. L. Campbell, Clerk.

* * * * * * *

11 In the Supreme Court of the State of Oklahoma.

No. 349.

CHARLES L. ROSS, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

Petition in Error.

Charles L. Ross, the plaintiff in error, complains of Minerva Stewart, the defendant in error, and alleges that on the 16th day of June, 1908, by the consideration of the District Court in and for the County of Sequoyah, State of Oklahoma, in a certain action then and there pending, wherein Charles L. Ross, the plaintiff in error, was plaintiff and Minerva Stewart, the defendant in error, was defendant, in Cause No. 682 pending in said Court, a judgment was rendered in favor of the defendant sustaining a demurrer to the plaintiff's petition and adjudging that the plaintiff take nothing by reason of his suit, and that the defendant do have and recover her costs of and from the plaintiff. That a full, true and complete transcript and copy of the judgment and all other proceedings had in said cause is hereto attached, made a part hereof, and is marked "Exhibit A."

And the plaintiff in error alleges that there is error in said judgment and proceedings in this, to-wit:

I.

The Court erred in sustaining the demurrer to the plaintiff's petition as amended.

II.

The Court erred in adjudging that the plaintiff take nothing by reason of his suit.

III.

The Court erred in adjudging that the defendant recover
12 costs of and from the plaintiff.

Wherefore, the plaintiff in error prays that said judgment may be reversed and that judgment be rendered in favor of this plaintiff in error, and for such other and further relief as may be equitable and just.

C. L. ROSS,
By W. H. KORNEGAY,
His Attorney.

(Filed August 15, 1908. W. H. L. Campbell, Clerk.)

13 "EXHIBIT A."

In the District Court of Sequoyah County, First Judicial District, State of Oklahoma.

CHAS. L. ROSS, Plaintiff,
vs.
MINERVA STEWART, Defendant.

Petition of Watts & Curtis to be Made Parties Defendant.

Comes now Watts & Curtis, and states to the Court that they are a co-partnership, composed of Jess W. Watts and W. L. Curtis, and are engaged in the practice of law, at Sallisaw, in Sequoyah County, and State of Oklahoma;

That they are necessary parties defendant in the above described action, for the following reasons, to-wit:

That on the 8th day of July, 1907, the defendant, Minerva Stewart, sold and delivered the said Lot No. 7 in Block No. 39, of the Town of Sallisaw, Okla. to Watts & Curtis, for a good and valid consideration, and by her certain warranty deed, which said deed was duly filed with the Recorder of Sequoyah County, and State of Oklahoma, on the 29th day of November, 1907, at 11:20 o'clock a. m., and duly recorded in Book One, page 57 of Deed Records;

That they are still owners of the above described land and premises, and are necessary parties to a proper determination thereof.

Wherefore, petitioners pray that they be permitted to become and be made parties defendant herein, and that they be permitted to file their separate answer deraingning title in themselves to the above described lands and premises.

WATTS & CURTIS,
Petitioners.

I, W. L. Curtis, do solemnly swear that I am a member of the law firm of Watts & Curtis, the above named persons, who are asking to be made parties defendant in this action, and that the facts set out in said petition are true.

W. L. CURTIS.

Subscribed and sworn to before me on this the 30th day of May, A. D. 1908.

KATE BELL,
Notary Public.

My Commission expires March 29, 1910.

14 Endorsed: No. 682. Chas. L. Ross, Plff. vs. Minerva Stewart, Deft. Petition of Watts and Curtis to be made parties Defendant. Filed May 30, 1908. E. M. Pointer, District Clerk.

15 In the District Court of Sequoyah County, State of Oklahoma, First Judicial District.

John H. Pitchford, Judge.

Demurrer.

CHARLES L. ROSS, Plaintiff,
vs.
MINERVA STEWART, Defendant.

Comes the defendant, Minerva Stewart, by her Attorneys, Watts & Curtis, and demurrers to the petition of the plaintiff, for the reason that same does not state facts sufficient to constitute a cause of action.

MINERVA STEWART, *Defendant,*
By WATTS & CURTIS, *Her Attorneys.*

Endorsed: No. 682. Chas. L. Ross, Pl'ff, vs. Minerva Stewart, Def't. Demurrer. Filed May 7, 1908. E. M. Pointer, District Clerk. Watts & Curtis, Attorneys for Defendant.

16 In the District Court of Sequoyah County, State of Oklahoma.

No. 682.

CHARLES L. ROSS, Plaintiff,
vs.
MINERVA STEWART, Defendant.

Record Entry.

On this 16th day of June, 1908, the demurrer to the petition heretofore filed came on for hearing, and the plaintiff appears in his own proper person and by W. H. Kornegay, his attorney, and the defendant appears in her own proper person and by Watts and Curtis, her attorneys; and the matters and things involved in said demurrer are by the respective counsel argued and by the Court considered; and, upon consideration of the same, the Court sustains the demurrer to the petition. And thereupon the plaintiff, by his counsel, asks leave to amend the petition, and thereupon leave is granted and the plaintiff is allowed until two (2) o'clock p. m. of said day for the purpose of filing an amended petition; and at two (2) o'clock p. m. of said day the amended petition is filed. And thereupon the defendant demurs to the amended petition, and the matters and things involved in said demurrer are by the respective counsel argued and by the court considered; and upon consideration of the same, the demurrer to the amended petition is sustained; and thereupon the plaintiff excepts to the action of the Court in sustaining said demurrer and elects to stand upon said petition. And thereupon the defendant moves for judgment on the pleadings, and the motion is granted.

It is, therefore, considered, ordered and adjudged That the plaintiff herein take nothing by reason of his suit herein, and that the defendant do have and recover of and from the plaintiff herein all her costs laid out and expended, which the clerk of the Court
17 is directed to tax; and to the rendition of said judgment, the defendant then and there excepted and still excepts.

JNO. H. PITCHFORD, *Judge.*

Endorsed: No. 682. Chas. L. Ross, Pl'ff, vs. Minerva Stewart, Def't. (Copy).

18 *Record Entry.*

No. 682.

CHARLES L. ROSS
vs.
MINERVA STEWART.

6/16/8. Defendant files demurrer. Demurrer Sustained.
6/16/08. Plaintiff files amended complaint.
" " " Defendant " demurrer to amended complaint.
" " " Demurrer sustained—Plaintiff excepts.
Exceptions noted, Plaintiff elects to stand on amended complaint.
6/16/08. Judgment in favor of the Defendant against the Plaintiff for cost.
Plaintiff objects and excepts to judgment; exceptions noted.

19 In the District Court for Sequoyah County, State of Oklahoma, June Term, A. D. 1908.

CHARLES L. ROSS, Plaintiff,
vs.
MINERVA STEWART, Defendant.

Amended Petition.

Plaintiff by leave of Court for amended petition says; that he is a citizen by blood of the Cherokee Nation and was such citizen during all the times hereinafter mentioned, and the defendant, Minerva Stewart, was not a citizen of said Nation at any time; and that she resides in Sequoyah County and the land involved in this suit lies therein, and is Lot 7 of Block 39 in the town of Sallisaw.

That said Lot lies in the Town-site laid off by the Secretary of the Interior and is a lot that was purchasable in the provision of Section 43 of the Cherokee Treaty of the year 1902; that at time of the passage of said Treaty and at the time of the appraisement of town lots in said town, this Plaintiff was in the undisputed possession of said lot and owned the improvements thereon, and had been in such possession for and had such owners out nearly a year prior to the adoption of said Treaty and continually thereafter to the present time; and that the improvements on the Lot were valuable and consisted of a two-roomed dwelling-house, fencing and out buildings of the value of Five Hundred ($500.00) Dollars.

That on the Thirtieth (30) day of October, 1903, this Plaintiff made application to the Town-site Commission for the Town of Sallisaw, Cherokee Nation, to have the said Lot listed and appraised and scheduled to him, and it was accordingly listed, appraised and scheduled to him.

That thereafter on October thirtieth (30), 1903, the Defendant, Minerva Stewart, made application to have said Lot scheduled to

her; in said application representing that she was in possession of said Lot, which representation was untrue; and also represented in said application that she owned the right of occupancy of said lot, which representation was untrue.

That her application was refused, and that thereafter, on the 9" day of May, 1905, she filed with the Town-site Commission or the Indian Inspector, a complaint in contest against this Plaintiff alleging that at the time of the filing of this complaint she owned said Lot, which allegation was untrue, and alleging also that she was entitled to possession of said Lot, which allegation was untrue, and alleged further that on January 13" 1900, she was married to John S. Stewart, deceased, and at said time he owned and was in possession of said lot and had built on said Lot a dwelling house, dug a well and erected other improvements, all being of the value of Five Hundred ($500.00) Dollars.

That in fact, at such time said John S. Stewart did not own any of the improvements and did not own the lot and the occupancy of such improvements, and the lot by him was held under Martha A. Snow, Plaintiff's grantor, in the capacity of tenant to said Martha A. Snow; and in said contest it was further alleged that said John S. Stewart, died February 16", 1901, and that the contestant occupied the premises until about the year 1903; and it was further alleged in said contest complaint that the Plaintiff herein was holding the premises without authority from the contestant, and that contestant owned the same. That the allegation as to her individual ownership was not true.

That at said time, the Plaintiff was imprisoned in the United States Jail at Vinita, and notice of such filing—requiring an answer in 10 days, was served upon him therein, and notice was therein accepted by him over ten (10) days before his discharge, and that upon receipt of said notice he employed J. G. McCombs, Attorney, of Sallisaw, Indian Territory, regularly licensed to practice in the United States Courts in the Indian Territory and regularly licensed to practice in the Interior Department and actively engaged in practice before said Courts and before said Department, and that he turned over to said Attorney, all his papers connected with said matter, and he paid said Attorney for his services, and was assured by said Attorney, that all things necessary to protect Plaintiff's rights would be done, and from time to time thereafter he was assured by said attorney that the necessary pleading had been filed and the contest would be later held and the evidence of both parties would be heard.

That on the 21st day of June, 1906, he tendered to the United States Indian Agent at Muskogee, J. Blair Shoenfelt, the full amount of the payment that would be due from him to the Cherokee Nation for said Lot, and said payment was credited by said Indian Agent on the 26" day of June, 1906, and was later refused because the Lot was in litigation and said money was held for some time and finally returned to await the result of the litigation; That again on June 3, 1907, a tender was made and refused because the Lot was, by the Indian Agent, alleged to be in litigation, and later tender was made in person by this Plaintiff to said Indian Agent and the

same was refused because property had been awarded to the Defendant, Minerva Stewart, as alleged by said Indian Agent.

That in February, 1907, plaintiff's said Attorney made inquiry of the Indian Inspector for the Indian Territory concerning said contest and was informed that the Lot was in litigation and he would be advised as soon as action was taken, and that later in said month, on inquiry of said Inspector, he was informed by him, that because Defendant did not within ten (10) days of service of the complaint in contest file answer thereto, he had forfeited all claims to the property and that it was the intention of the office to render formal decision relative to his rights after the first of the succeeding month, that under the rules prescribed by the Secretary of the Interior it was necessary to serve the Plaintiff or his Attorney with a copy of his decision after its rendition, and of his right to appeal:

That no notice was ever given to Plaintiff or to his attorney of the rendition of such decision, though Plaintiff is informed that on October 8, 1907, patent was approved to Minerva Stewart to said Lot. That the said Minerva Stewart never owned any improvements on said Lot and was not in possession in any form of the said
22 Lot at the time of the filing by Plaintiff or thereafter;

Further that she was dispossessed by the United States Marshal in the year 1902, about May 5th, and that prior to said time she was never in possession except as the wife of John S. Stewart, whose possession during the time she was his wife was that of a tenant of Martha Snow, hereinafter mentioned;

That on the 5th day of May, 1902, in a certain suit number 837, wherein said Minerva Stewart was plaintiff and said Martha A. Snow was defendant, pending in the United States Court for the Northern District of the Indian Territory at Wagoner, a judgment was duly given and rendered by the United States Court aforesaid, in favor of Martha Snow and against the said Minerva Stewart, for the recovery of the improvements and the Lot involved therein, and by said Judgment the claim of said Minerva Stewart to said Lot was forever barred.

That about the close of the year 1902, the Plaintiff succeeded to all the rights of Martha Snow to said Lot and improvements and she made him a Bill of Sale thereto but it has been lost and the copy thereto is not set out. That at said time said Martha Snow owned the improvements.

That in the suit aforesaid concerning the said Lot and improvements, the title of Martha Snow was deraigned from the John S. Stewart mentioned in the contest hereinafter referred to under conveyance of November 16, 1899, and all these things were well known to the defendant at the time of the institution of the contest.

That the Plaintiff is informed and believes that his said Attorneys had in due time filed with the Townsite Commission and the Indian Inspector an answer to the contest proceedings stated by the defenses of the Plaintiff thereto, but the record of the case does not show this and said answer cannot be found in the files, but all parties thereto prior to the notification in February, 1907, acted on the assumption that a day would be set for the hearing and the evidence of all parties

introduced. The Plaintiff stands ready and willing to pay defendant any amount she may have paid; that this Plaintiff should
23 have paid to the Cherokee Nation for the title to said Lot, together with the legal interest thereon if on the hearing it shall be ascertained that there is anything due her.

That by reason of the misrepresentation of the defendant as aforesaid and by reason of the fact that Plaintiff's attorney either failed to file an answer in the contest proceedings, or that said answer having been filed was disregarded by the Indian Inspector or the Town-site Commission and by reason of the action of the Indian Inspector in misleading the plaintiff and by reason of Plaintiff believing that his defense was actually filed this Plaintiff did not take further steps to prevent the Patent from being issued to the Defendant.

And for the further reason that he had no notice whatever that the Indian Inspector or the Town-site Commission had ever rendered any judgment forfeiting his rights until the patent was actually issued. That under the complaint in contest the officers of the Interior Department were not authorized to set aside the Scheduling to the Plaintiff of the Lot. That said complaint did not show that the defendant, Minerva Stewart, was entitled to said Lot under the Law and said officers under said complaint had no authority to judge that she was so entitled or to cancel the scheduling of said Lot to said plaintiff and under the showing made the said officers had no right to issue a patent to the Defendant, Minerva Stewart, and the said Minerva Stewart well knew that she had no right to receive same.

That the officers of the Interior Department had no right by law to forfeit plaintiff's right to said Lot and to schedule Lot to Defendant without hearing. That by reason of the mistakes of said officers and by reason of the plaintiff being misled, and by reason of the disappearance from the files, or failure of Plaintiff's attorney to file answer, and by reason of the fact that improvements on the Lot belonged to the Plaintiff at the time of the passage of the Cherokee Treaty; and by reason of the fact that he was in the undisputed possession of them at said time as well as at all times there-
24 after; this Plaintiff is the equitable owner of the land in question, and in equity and good conscience the legal title to said land belongs to the plaintiff and not to the Defendant, Minerva Stewart, who has procured a patent therefor in the manner herein before recited; and the premises considered, the Plaintiff asks;

That the title of the defendant be decreed to belong to the Plaintiff, and that the defendant be required to make a deed to the plaintiff of the Lot in controversy and that in the event this is not done, a decree be entered vesting the legal title to the Lot in the Plaintiff and divesting the Defendant of the title thereto, and that the Plaintiff to have and recover his costs herein laid out and expended and that the Plaintiff do have all other and further relief, to which in equity and good conscience he may be entitled.

CHARLES L. ROSS,
By W. H. KORNEGAY, *Att'y.*

STATE OF OKLAHOMA,
County of Sequoyah, ss:

I, Charles L. Ross, on oath do say that the statements of the foregoing Petition are true as I verily believe.

CHAS. L. ROSS.

Subscribed and sworn to before me this 16th day of June, 1908.

E. M. POINTER,
Dist. Clerk.

I, E. M. Pointer, Clerk of the District Court of Sequoyah County, State of Oklahoma, do hereby certify the above to be a true, perfect and complete copy of amended complaint, demurrer record entry, and petition of Watts & Curtis to be made parties defendant in the case of Chas. L. Ross vs. Minerva Stewart, as shown by the files and records of my office.

Witness my hand and seal of this office, this 3rd day of July, 1908.

[SEAL.]

E. M. POINTER,
Dis't Clerk.

(Filed August 15, 1908. W. H. L. Campbell, Clerk.)

Endorsed: No. 682. C. L. Ross vs. Minerva Stewart. Amended Complaint. Filed June 16, 1908. E. M. Pointer, Dist. Clerk. W. H. Kornegay.

25 Case-made endorsed as follows:
No. 349. In the Supreme Court of the State of Oklahoma. Charles L. Ross, Plaintiff in Error, vs. Minerva Stewart, Defendant in Error. Petition in Error. 8/15/08. Ret. 8/26/08. (Filed August 15, 1908. W. H. L. Campbell, Clerk Supreme Court). W. H. Kornegay, Att'y for Plaintiff in Error.

26 And thereafter, at the November 1908 Term, of the Supreme Court of Oklahoma, on the 11th day of November, 1908, the following proceedings were had in said cause.

Supreme Court, November Term, 1908, November 11th, 1908, Second Judicial Day.

#349.

CHARLES L. ROSS, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

Ordered by the court that defendant in error in the above cause be allowed until November 15th, 1908, in which to serve copy of brief and file same.

27 And thereafter, at the November 1909 Term, of the Supreme Court of Oklahoma, on the 9th day of November 1909, the following proceedings were had in said cause.

Supreme Court, November Term, 1909, November 9th, 1909, First Judicial Day.

#349.

CHARLES L. Ross, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

28 And thereafter, at the January 1910 Term, of the Supreme Court of Oklahoma, on the 11th day of January 1910, the following proceedings were had.

Supreme Court, January, 1910, Term, January 11th, 1910, First Judicial Day.

#349.

CHARLES L. Ross, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the Court having duly considered the same and being fully advised in the premises, finds, that the judgment of the court below in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the court below in the above cause, be, and the same is hereby affirmed.

Opinion by Kane, C. J.

All the Justices concur.

29 No. 349.

In the Supreme Court of the State of Oklahoma.

CHARLES L. Ross, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

(Filed this 25th day of January, 1910.)

1. The townsite commissioners of the Cherokee Nation were tribunals having exclusive original jurisdiction over the contests between claimants to town lots in that part of the Indian Territory.

2. A patent issued by such tribunal is impervious to attack in a court of equity unless the commission was induced to issue it to the wrong party by an erroneous view of the law or by a gross or fraudulent mistake of the facts.

3. When officers of the Land Office decide controverted questions of fact, in the absence of fraud, imposition or mistake, their decisions on those questions are final, except as they may be reversed on appeal in that department.

4. A petition filed in a court of equity for the purpose of having the holder of a patent to a town lot in one of the towns of the Cherokee Nation declared the trustee for an adverse claimant, should only be held sufficiently when the facts upon which relief is prayed are clearly and fully stated.

(*Syllabus by the Court.*)

Error from the District Court of Sequoyah County.

Before J. H. Pitchford, Judge.

Affirmed.

W. H. Kornegay, attorney for plaintiff in error.

Jess W. Watts, attorney for defendant in error.

30 Opinion of the court by KANE, *C. J.*:

The only assignment of error in this case is to the effect that the court below erred in sustaining the general demurrer to the amended petition of the plaintiff in error, plaintiff below. The amended petition is in words and figures as follows: "Plaintiff by leave of court for amended petition says: that he is a citizen by blood of the Cherokee Nation, and was such citizen during all the times hereinafter mentioned, and the Defendant, Minerva Stewart, was not a citizen of said Nation at any time; and that she resides in Sequoyah county and the land involved in this suit lies therein, and is lot 7 of block 39 in the town of Sallisaw. That said lot lies in the townsite laid off by the secretary of the interior and is a lot that was purchasable in the provision of section 43 of the Cherokee treaty of the year 1902; that at time of the passage of said treaty and at the time of the appraisement of town lots in said town, this plaintiff was in the undisputed possession of said lot and owned the improvements thereon, and had been in such possession for and had such owners out nearly a year prior to the adoption of said treaty and continually thereafter to the present time; and that the improvements on the lot were valuable and consisted of a two-roomed dwelling house, fencing and out-buildings of the value of five hundred ($500.00) dollars. That on the thirtieth (30) day of October, 1903, this plaintiff made application to the townsite commission for the town of Sallisaw, Cherokee Nation, to have the said lot listed and appraised and scheduled to him, and it was accordingly listed, appraised and scheduled to him. That thereafter on October thirtieth

(30) 1903, the defendant, Minerva Stewart, made application to have said lot scheduled to her; in said application represent-
31 ing that she was in possession of said lot, which representation was untrue; and also represented in said application that she owned the right of occupancy of said lot, which representation was untrue. That her application was refused, and that thereafter, on the 9th day of May, 1905, she filed with the townsite commission or the Indian Inspector, a complaint in contest against this plaintiff, alleging that at the time of the filing of this complaint she owned said lot, which allegation was untrue, and alleging also that she was entitled to possession of said lot, which allegation was untrue, and alleged further that on January 13" 1900, she was married to John S. Stewart, deceased, and at said time he owned and was in possession of said lot and had built on said lot a dwelling house, dug a well and erected other improvements, all being of the value of five hundred ($500.00) dollars. That in fact, at such time said John S. Stewart did not own any of the improvements and did not own the lot and the occupancy of such improvements, and the lot by him was held under Martha A. Snow, plaintiff's grantor, in the capacity of tenant to said Martha A. Snow, and in said contest it was further alleged that said John S. Stewart, died February 16", 1901, and that the contestant occupied the premises until about the year 1903; and it was further alleged in said contest complaint that the plaintiff herein was holding the premises without authority from the contestant, and that contestant owned the same. That the allegation as to her individual ownership was not true. That at said time, the plaintiff was imprisoned in the United States Jail at Vinita, and notice of such filing, requiring an answer in 10 days, was served upon him therein, and notice was therein accepted
32 by him over ten (10) days before his discharge and that upon receipt of said notice he employed J. G. McCombs, attorney, of Sallisaw, Indian Territory, regularly licensed to practice in the United States courts in the Indian Territory and regularly licensed to practice in the interior department and actively engaged in practice before said courts and before said department, and that he turned over to said attorney, all his papers connected with said matter, and he paid said attorney for his services, and was assured by said attorney that all things necessary to protect plaintiff's rights would be done, and from time to time thereafter he was assured by said attorney that the necessary pleading had been filed and the contest would be later held and the evidence of both parties would be heard. That on the 21st day of June, 1906, he tendered to the United States Indian Agent of Muskogee, J. Blair Shoenfelt, the full amount of the payment that would be due from him to the Cherokee Nation for said lot, and said payment was credited by said Indian Agent on the 26" day of June, 1906, and was later refused because the lot was in litigation and said money was held for sometime and finally returned to await the result of the litigation; that again on June 3, 1907, a tender was made and refused because the lot was, by the Indian Agent, alleged to be in litigation, and later tender was made in person by this plaintiff to said Indian Agent and the same was refused because property had

been awarded to the defendant, Minerva Stewart, as alleged by said Indian Agent. That in February, 1907, plaintiff's said attorney made inquiry of the Indian Inspector for the Indian Territory concerning said contest, and was informed that the lot was in litigation and he would be advised as soon as action was taken, and that
33 later in said month, on inquiry of said Inspector, he was informed by him that because defendant did not within ten (10) days of service of the complainant in contest file answer thereto he forfeited all claims to the property and that it was the intention of the officer to render formal decision relative to his rights after the first of the succe-ding month, that under the rule prescribed by the Secretary of the Interior it was necessary to serve the plaintiff or his attorney with a copy of his decision after its rendition, and of his right to appeal. That no notice was ever given to plaintiff or to his attorney of the rendition of such decision, though plaintiff is informed that on October 8th, 1907, patent was approved to Minerva Stewart to said lot. That the said Minerva Stewart never owned any improvements on said lot and was not in possession in any form of the said lot at the time of the filing by plaintiff or thereafter; further, that she was dispossessed by the United States Marshall in the year 1902, about May 5th, and that prior to said time she was never in possession except as the wife of John S. Stewart, whose possession during the time she was his wife was that of a tenant of Martha Snow, hereinafter mentioned; that on the 5th day of May, 1902, in a certain suit number 837, wherein said Minerva Stewart was plaintiff and said Martha A. Snow was defendant, pending in the United States Court for the northern district of the Indian Territory, at Wagoner, a judgment was given and rendered by the United States Court aforesaid, in favor of Martha Snow and against the said Minerva Stewart, for the recovery of the improvements and the lot involved therein, and by said judgment the claim of said Mi-
34 nerva Stewart to said lot was forever barred. That about the close of the year 1902, the plaintiff succeeded to all the rights of Martha Snow to said lot and improvements and she made him a bill of sale thereto, but it has been lost and the copy thereto is not set out. That at said time said Martha Snow owned the improvements. That in the suit aforesaid concerning the said lot and improvements, the title of Martha Snow was deraigned from the John S. Stewart mentioned in the contest hereinafter referred to under conveyance of November 16, 1899, and all these things were well known to the defendant at the time of the institution of the contest. That the plaintiff is informed and believes that his said attorney had in due time filed with the townsite commission and the Indian Inspector an answer to the contest proceedings stated by the defenses of the plaintiff thereto, but the record of the case does not show this and said answer cannot be found in the files, but all parties thereto prior to the notification in February, 1907, acted on the assumption that a day would be set for the hearing and the evidence of all parties introduced. The plaintiff stands ready and willing to pay defendant any amount she may have paid; that this plaintiff should have paid to the Cherokee Nation for the title to said lot, together with the legal interest thereon if on the hearing it shall

be ascertained that there is anything due her. That by reason of the misrepresentation of the defendant as aforesaid, and by reason of the fact that plaintiff's attorney either failed to file an answer in the contest proceedings, or that said answer having been filed was disregarded by the Indian Inspector or the townsite commission and by reason of the action of the Indian Inspector in misleading the plaintiff and by reason of plaintiff believing that his defense
35 was actually filed this plaintiff did not take further stips to prevent the patent from being issued to the defendant. And for the further reason that he had no notice whatever that the Indian Inspector or the townsite commission had ever rendered any judgment forfeiting his rights until the patent was actually issued. That under the compalint in contest the officers of the interior department were not authorized to set aside the scheduling to the plaintiff of the lot. That said complaint did not show that the defendant, Minerva Stewart, was entitled to said lot under the law and said officers under said complaint had no authority to judge that she was so entitled or to cancel the scheduling of said lot to said plaintiff and under the showing made the said officers had no right to issue a patent to the defendant, Minerva Stewart, and the said Minerva Stewart well knew that she had no right to receive same. That the officers of the interior department had no right by law to forfeit plaintiff's right to said lot and to schedule lot to defendant without hearing. That by reason of the mistakes of said officers and by reason of the plaintiff being misled, and by reason of the disappearance from the files, or failure of plaintiff's attorney to file answer, and by reason of the fact that improvements on the lot belonged to the plaintiff at the time of the passage of the Cherokee treaty, and by reason of the fact that he was in the undisputed possession of them at said time as well as at all times thereafter, this plaintiff is the equitable owner of the land in question, and in equity and good conscience the legal title to said land belongs to the plaintiff and not to the defendant, Minerva Stewart, who has procured a patent therefor in the manner herein before recited; and the premises considerd, the plaintiff asks, that the title of the defendant be decreed to
36 belong to the plaintiff, and that the defendant be required to make a deed to the plaintiff of the lot in controversy and that in the event this is not done, a decree be entered vesting the legal title to the lot in the plaintiff and divesting the defendant of the title thereto, and that the plaintiff do have and recover his costs herein laid out, and expended, and that the plaintiff do have all other and further relief, to which in equity and good conscience he may be entitled."

All the parties seem to agree upon the law of the case, and only differ upon its application. The case of Wallace et al. v. Adams et al., 143 Fed. 716, states the rule applicable to such cases with as much precision and accuracy as any called to out attention, in the following languages: "The Commission (speaking of the Dawes Commission) under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotements of these lands and to execute its judgments by the issue of the allotment certificates which constitute convey-

ances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. U. S. v. Winna & St. Peter R. Co., 15 C. C. A. 96, 103, 67 Fed. 948, 955. Like a patent it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent
37 mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. James v. Germania Iron Co., 46 C. C. A. 476, 479, 107 Fed. 597, 600." We do not understand that the cases of Leak et al. v. Joslin, 20 Okla. 200, and Brooks v. Garner, Okla. 236, extend the rule announced by the federal court. The syllabus to Leak et al. v. Joslin, supra, reads as follows: "When townsite commissioners, by virtue of an act of Congress otherwise known as the 'Supplemental Creek Agreement' (March 1, 1901, c. 676, 31 Stat. 861), where there is no conflict as to the facts, but by a misconstruction of the law as applied to the facts, schedule a lot to a party who is not entitled to the same under the law, after title has passed to a private party, courts of equity will inquire as to whether or not such title shall be held as trustee for the party really entitled to same."

Under the foregoing authorities, unless the townsite commission was induced to issue its patent to the lot in controversy to the
38 wrong party by an erroneous view of the law or by a gross or fraudulent mistake of the facts, the demurrer to the petition was properly sustained. The error of law committed by the townsite commission, if any, is not specifically pointed out by counsel for plaintiff in error in his brief, and a careful examination of the petition fails to disclose facts upon which such error can be predicated, nor are there to our mind sufficient facts alleged to charge the townsite commission with having issued the patent to the wrong person through a gross and fraudulent mistake of the facts. The petition alleges, in substance, that before the time the contest was filed before the townsite commissioners the contestee was imprisoned in the United States jail at Vinita; that notice was accepted by him, and he employed an attorney and turned over to said attorney all his papers connected with the matter, and he was assured by said attorney that all things necessary to protect his rights would be done;

that his attorney made inquiry of the Indian Inspector concerning the contest and was informed that the lot was in litigation, and later he was informed by him that because defendant did not within ten days of service of the notice of contest file answer thereto, he had forfeited all claim to the property and that it was the intention of the commission to render formal decision relative to his rights after the first of the succeeding month. Then follow allegations to the effect that by reason of the misrepresentation of the defendant and by reason of the fact that plaintiff's attorney either failed to file an answer in the contest proceedings or that said answer having been filed was disregarded by the Indian Inspector or the townsite commis-
39 sion, and by reason of the action of the Indian Inspector in misleading the plaintiff, and by reason of plaintiff believing that his defense was actually filed, this plaintiff did not take further steps to prevent the patent from being issued to the defendant. Such allegations do not bring the case within the second ground upon which a patent may be attacked collaterally, to-wit, that its issuance was induced by gross and fraudulent mistake of facts. The alleged negligence of his counsel in failing to file his answer within the time prescribed, if such was the case, does not warrant the interference of a court of equity in his behalf, in the face of the decision of the townsite commission. "Before a court of equity will intercede to declare the holder of the legal title a trustee for an adverse claimant, such adverse claimant must show in his bill for relief that he has availed himself of all the rights before the land department officials, and that he has performed every requirement of the law and rules regulating the acquiring of title applicable to the land he claims; and he cannot set up his own laches, neglect, mistake, or inadvertence as an excuse for a failure to comply with the law, unless such default was brought about by the fraud, wrong, or misconduct of his adversary." 3 Ballard of the law of Real Property, sec. 588; Twine v. Carey, 2 Okla. 249. The petition does not state any facts sufficient to inform the court what misrepresentations there were, if any, on the part of the defendant in error or the townsite commission that misled him to his injury. He does not allege that the Inspector told the plaintiff in error that he disregarded his answer, if in fact he filed it, or that he only considered the
40 contestant's evidence in awarding the lot, but rests upon the broad statement that the Indian Inspector misled him. Such allegations as "thereafter on October thirtieth, 1903, the defendant Minerva Stewart, made application to have said lot scheduled to her, in said application representing that she was in possession of said lot, which representation was untrue; and also represented in said application that she owned the right of occupancy of said lot, which representation was untrue," and "that the allegation as to her individual ownership was untrue," etc., all raise questions of fact that should have been tried before the townsite commission, and the townsite commission's findings thereon, unless induced by a gross or fraudulent mistake of the facts, are final. When officers of the Land Office decide controverted questions of fact, in the absence of fraud, imposition or mistake, their decisions on those questions are final, except as they may be reversed on appeal in that department.

Johnson v. Towsley, 13 Wall. 72. The case of Durango Land & Coal Co. v. Evans et al., 80 Fed. 425, discusses practically all the questions waived in the case at bar. In that case, Judge Thayer, who delivered the opinion of the court, uses the following language: "The allegations in the bill respecting these proceedings in the Land Department are very vague and unsatisfactory. The bill simply advises us that Evans filed an affidavit in the local land office at Leadville on June 27, 1892, charging that the entry by McMaster was not made for his own use, and that he (Evans) subsequently obtained a patent for the land in controversy. The further course of the proceeding before the land department, after the affidavit was filed, is not described with any detail or certainty, and but for
41 a casual allusion made in the brief of counsel for the appellant, to a decision rendered by the Secretary of the Interior, we should be in doubt whether the contest ever reached the secretary, or was terminated by the decision of some inferior officer of the land department. Enough appears, however, to justify us in presuming, as against the complainant company, that a contest was duly inaugurated by Evans against said company, that it had due notice of Evans' claim, and opportunity to defend; that it did defend; that the contest ran its course in the prescribed way through the department until it reached the Secretary of the Interior; and that a patent was ultimately awarded to Evans. Viewed in this aspect, the case at bar is one in which the complainant seeks to set aside and impeach the judgment of the land department; and the doctrine is too well settled to admit of any controversy that the decision of that tribunal upon questions properly pending before it can only be annul-ed when such fraud or imposition is shown to have been practiced as prevented the unsuccessful party in a contest from fully presenting his case, or the officers composing the tribunal from fully considering it, or when such officers have themselves been guilty of fraudulent conduct, or when it is made to appear that, upon the case established before the land department, the law applicable thereto was misconstrued or misapplied. If fraud is charged as a ground for annulling a decision of the land department, it is not enough that false testimony or forged documents have been employed; but it must be made to appear that such false testimony has affected the decision, and led to a result which otherwise would not have been reached. And inasmuch as the findings of the land department on questions of fact are conclusive, when the charge is that the
42 land department has erred in the decision of a mixed question of the law and fact, what the facts were, as laid before and found by the department, must be shown, so as to enable the court to see clearly that the law has been misconstrued.

These propositions have been so frequently stated and applied that it is hardly necessary to repeat them. Lee v. Johnson, 116 U. S. 48, 50, 6 Sup. Ct. 249; Quinby v. Conlan, 104 U. S. 420, 426; Marquez v. Frisbie, 101 U. S. 473, 476; Vance v. Burbank, 101 U. S. 514, 519; Smelting Co. v. Kemp, 104 U. S. 636, 640; Moore v. Robbins, 96 U. S. 530; Shepley v. Cowan, 91 U. S. 330, 340; Johnson v. Towsley, 13 Wall. 72; Sanford v. Sanford, 139 U. S. 542, 11 Sup.

Ct. 666." The opinion concludes: "No decision by the land department would have any weight, or afford any protection to a successful litigant in that department, if, without any statement of what the facts were as presented to the department, the whole controversy could be opened in the court by general allegations, such as are found in the present bill, that the successful litigant had exhausted his right to enter land, or was otherwise disqualified, or had abandoned his entry. These are matters which were properly cognizable before the land department when the contest was pending. The presumption is that all such questions were brought to the attention of the department, and were duly considered and properly decided. The burden was on the complainant, therefore, when it sought to reopen the controversy for errors of law, to show what the facts were before the land department to which the law was applied. We are forced to conclude that, by the averments of the present bill, this burden was not successfully discharged." The pleading demurred to in the foregoing case is set out in full in the opinion of the court, and resembles the petition herein in a great many particulars. Both pleadings contain a good deal of vigorous declamation, but both are
wanting in the averment of facts which are indispensable to
43 give them sufficiency as pleadings for the purpose intended.

"The respect due to a patent, the presumptions that all the preceeding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon those official instruments, demand that the effort to set them aside, to annul them or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof." Maxwell Land-Grant case, 121 U. S. 325.

In Tynon v. Hall et al., (Okla.), 98 Pac. 895, it was held that the townsite commissions of the Cherokee Nation were tribunals having exclusive jurisdiction over contests between claimants to town lots in that part of the Indian Territory.

Judgment of the court below is affirmed.

Dunn, Williams, Hayes and Turner, JJ., concur.

44 In the Supreme Court of the State of Oklahoma.

No. 349.

CHARLES L. ROSS, Plaintiff in Error,
vs.
MINERVA STEWART, Defendant in Error.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 43 pages, numbered from 1 to 43, both inclusive, are a full, true and complete transcript of the record and all proceedings had in the above entitled cause, as the same remains on file and of record in my office.

In witness whereof, I hereunto set my hand and affix the seal of said court, at Guthrie, this 20" day of September, 1910.

W. H. L. CAMPBELL,
Clerk Supreme Court of the State of Oklahoma.
By W. M. BONNER, *eputy.*

[Seal Supreme Court, State of Oklahoma.]

Endorsed on cover: File No. 22,326. Oklahoma Supreme Court. Term no. 140. Charles L. Ross, plaintiff in error, vs. Minerva Stewart. Filed September 30th, 1910. File No. 22,326.

INDEX.

	PP.
Argument	12 to 43
Assignment of Errors	11 to 12
Statement	1 to 11

CASES CITED.

Adams vs. Couch	13-14-27
Brooks vs. Garner	35
Durango Land & Coal Co. vs. Evans	43
Garrett vs. Walcott	33
Leak vs. Joslin	34
Johnson vs. Towsley	
Metcalf vs. Williams	40
Mitchell vs. Bell	35
Oolagah Coal Co. vs. M'Caleb et al	42
Regulations of Interior Department	25 to 27
Twine vs. Carey	16-27
Tynon vs. Hall	12

In the Supreme Court of the United States
October Term, 1912

Charles L. Ross - *Plaintiff in Error.*
vs.
Minerva Stewart, *Defendant in Error.*
No. 140.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

This cause originated in the District Court of Sequoyah County, Oklahoma, by the filing by plaintiff in error, Charles L. Ross, of a petition, followed by a demurrer, and an amended petition on June 16, 1908, and a general demurrer to the amended petition, which was sustained on June 16, 1908, and an exception was taken, followed by final judgment against plaintiff, that he take nothing and that defendant recover her

costs. Exception was taken to the judgment. See Record page 10.

In due time proceedings in error were instituted in the Supreme Court of the State, the Court of last resort. The decision of the lower Court was affirmed. See page 10 of the record. The amended petition appears on pages 11, 12, 13, 14 and 15 of the record.

The demurrer appears on page 9 and was on the ground that the petition did not state facts sufficient to constitute a cause of action.

The Supreme Court of the State on January 25, 1910, affirmed the judgment of the Court below and rendered an opinion which is found on pages 16 to 24 of the record.

This was followed in due time by proceedings in error and the case is before this court on such proceedings. The petition in substance alleged that the plaintiff was at all times a citizen of the Cherokee Nation and defendant was not a citizen. That the land was a town lot and was in a town laid off by the Secretary of the Interior. It was further stated, and the claim was made that under the provision of the Cherokee Agreement of 1902, Section 43 the land was purchasable.

It was further averred that plaintiff owned the improvements at the time of the adoption of the agree-

ment and had been the owner and in undisputed possession for a year prior thereto and the improvements were valuable and lasting and consisted of a dwelling house and out buildings and were worth Five Hundred Dollars.

It was further averred that on application the townsite commissioners for Sallisaw had appraised and scheduled the lot to plaintiff on October 30th, 1903. That on October 30th, 1903, after this was done the defendant made application to have the lot scheduled to her and her application was refused.

It was further alleged that in making her application she falsely represented that she was in possession and owned the right of occupancy.

It was further stated that on May 9th, 1905, defendant had filed with the townsite commissioners or the Indian Inspector a contest complaint. It was further stated that defendant's claim was based on an allegation of ownership of the lot and said allegation was not true, and a further allegation of being entitled to possession of the lot which was untrue, and allegation that she was married on January 13, 1900, to John Stewart, who made the improvements.

There was a further allegation in the petition that in fact the said Stewart was a tenant of Martha Snow, plaintiff's grantor.

There was a further statement in the petition that there was an allegation in the contest that Stewart died in the year 1901, and that the contestant occupied the premises until about the year 1903, and that the contestant, plaintiff in the case, was holding the premises without authority from the contestant.

The petition further stated that the allegation as to individual ownership was not true.

There was a further statement as to the plaintiff being in jail when the contest notice was served, and his employing and paying a regular licensed attorney to look after the matter, and of his being assured by his attorney that the necessary pleadings had been filed, and that later the contest would be heard.

There was a further allegation of tender to the proper authority of the amount required for its purchase on three different occasions. It was stated that on the first offer made June 21st, 1906, the amount was received and credited by the Indian Agent, on June 26, 1905, and was later refused, and after being held for sometime was finally returned to await the result of the litigation.

It was further averred that on June 3, 1907, a second tender was made and refused for the reason that the lot was in litigation, and later a tender was made and refused, becaues the lot had been awarded

to the defendant. There was a further allegation to the effect that in February, 1907, his attorney was informed by the Inspector that the lot was in litigation and he would be advised as soon as any action was taken, and that later he was informed by the Inspector that the plaintiff had forfeited his rights to the property because he had not filed an answer to the contest within ten days after service of notice of contest, and that a formal decision would be rendered after the first of the succeeding month to that effect.

It was further alleged that under the rules prescribed by the Secretary it was necessary that a copy of the decision should be sent to the plaintiff or his attorney of record and that no notice was ever given to plaintiff or his attorney of record.

There was a further allegation that patent was issued about October 8th, 1907. There was a further allegation that defendant never owned any improvements on the lot and was not in possession at the time the plaintiff filed or any time afterwards.

There was a further allegation that she was dispossessed by the United States Marshal about May 5, 1902, and she was never in possession except as the wife of John S. Stewart, a tenant of Martha Snow.

That on the 5th day of May, 1902, a judgment was rendered in the United States Court for the Indian

Territory, Northern District, in favor of plaintiff's grantor and against the defendant forever barring defendant.

There was a further statement that in said suit that the title of plaintiff's grantor was deraigned from the John S. Stewart mentioned in the contest by a conveyance of November 16, 1899, and all these things were well known to the defendant when she instituted the contest.

There was a further allegation on information and belief that an answer was filed but the record did not so show.

There was a further statement that all parties prior to February, 1907, had acted on the assumption that a day would be set for the hearing and evidence taken, and as an offer to pay whatever defendant had paid the Nation and legal interest, if on the hearing it should be ascertained that anything was due.

There was a further statement that by reason of the misrepresentation of the defendant and theretofore set out, and that the plaintiff's attorney failed to file the answer or the answer if filed was disregarded and by being misled by the action of the Inspector and believing his defense had been filed, he took no further steps to prevent the patent being issued.

He further pled the want of notice of the decis-

ion of the Indian Inspector or the Townsite Commissioner. He denied the authority of the officers of the Interior Department to set aside the scheduling of the lot to him. He further attacked the complaint in contest as not showing sufficient facts to warrant the issuance of the patent to Minerva Stewart. The concluding part of the amended petition is as follows:

"That the officers of the Interior Department had no right by law to forfeit plaintiff's right to said lot and to schedule lot to defendant without hearing. That by reason of the mistake of said officers and by reason of the plaintiff being misled, and by reason of the disappearance from the files, or failure of plaintiff's attorney to file answer, and by reason of the fact that improvements on the lot belonged to the plaintiff at the time of the passage of the Cherokee Treaty; and by reason of the fact that he was in the undisputed possession of them at said time as well as at all times thereafter; this Plaintiff is the equitable owner of the land in question, and in equity and good conscience the legal title to said land belongs to the plaintiff and not to the Defendant, Minerva Stewart, who has procured a patent therefor in the manner herein before recited; and the premises considered, the Plaintiff asks:

That the title of the defendant be decreed to belong to the plaintiff, and that defendant be required to

make a deed to the plaintiff of the lot in controversy and that in the event this is not done, a decree be entered vesting the legal title to the lot in the Plaintiff and divesting the Defendant of the title thereto, and the Plaintiff do have and recover his costs herein laid out and expended and that the Plaintiff do have all other and further relief, to which in equity and good conscience he may be entitled."

An opinion was filed sustaining the action of the lower court: It sets out the amended petition: It quotes from Adams vs. Wallace, 143 Fed. 716, and says that the decisions of the Supreme Court of Oklahoma in Leak vs. Joslin, and Brooks vs. Garner do not extend the rule. It is stated in the opinion that the error of law, if any committed by the Townsite Commission was not pointed out and that a careful examination of the pleadings disclosed none. Twine vs. Carey, 2 Okla., 249, was cited to the effect that the petition was insufficient; and Johnson vs. Towsley, 13 Wall 72, and Durango Land & Coal Co., vs. Evans 80 Fed. 425, as authority for denying relief. The pleadin gwas then characterized as containing a good deal of vigorous declamation, but wanting in the averment of facts indispensible to give sufficiency to a pleading for the purpose intended. The decision in Tynon vs. Hall 98, Pacific 895, was cited as authority to the effect

that the Townsite Commission of the Cherokee Nation had exclusive jurisdiction over contests between claimants to town lots in the Cherokee Nation.

ASSIGNMENT OF ERRORS.

Plaintiff in Error makes the following assignments of error:

I.

That the District Court of Sequoyah County, Oklahoma, erred in sustaining the demurrer to his petition and in holding and deciding that the fates stated therein were not sufficient to constitute a cause of action, and the Supreme Court of the State of Oklahoma erred in affirming said judgment.

II.

That the District Court of Sequoyah County, Oklahoma, erred in dismissing the case of the plaintiff, and the Supreme Court of the State of Oklahoma erred in affirming said judgment of dismissal.

III.

That the District Court of Sequoyah County, Oklahoma, erred in rendering a judgment against the plaintiff for costs, and the Supreme Court of the State of Oklahoma erred in affirming said judgment.

IV.

That the District Court of Sequoyah County, Ok-

lahoma, erred in sustaining the demurrer to the plaintiff's petition and in dismissing the case at the cost of the plaintiff, and the Supreme Court of the State of Oklahoma erred in affirming such judgment.

And the plaintiff in error says that all the things complained of in Assignments No. 1, 2, 3 and 4 took place over his objection and exception and to his damage.

ARGUMENT.

The assignments of error raise the question of the sufficiency of the petition to withstand a general demurrer. An analysis of the opinion of the lower court discloses that the court practically held that the Townsite Commission for the town of Sallisaw had exclusive jurisdiction of the matter. It was claimed by plaintiff in error that this commission did not have exclusive jurisdiction and further that it had no jurisdiction of a contest between rival claimants to a town lot, and that jurisdiction to settle this was in the courts, not the commission. The opinion says: "In Tynon v. Hall et al., (Okla.) 98 Pac. 895, it was held that the townsite commissions of the Cherokee Nation were tribunals having exclusive jurisdiction over contests between claimants to town lots in that part of the Indian Territory." The language of the opinion in Tynon v. Hall as far as it bears on this question is as follows:

"There may also be another reason for sustaining the judgment of the court below. The defendant, Martha Hall, a Cherokee by blood, was claiming the lot by reason of her purchase from Eden, who was also a Cherokee citizen, and she had been in actual peaceable possession of the same from the time she purchased it to the time the suit was brought at least. She duly filed upon the lot before the Cherokee townsite commission, and the plaintiff filed a contest against her. What the outcome of the contest was does not appear from the record, but it would seem that under the showing made the court below was evidently of the opinion that the possession of defendant, which was clearly adverse to the right of the plaintiff, ought not to be disturbed while the contest was pending before the townsite commission, a tribunal which had exclusive jurisdiction over that class of litigation. It is not unusual for courts to entertain ejectment suits to sustain the possessory rights of a plaintiff against mere trespassers or intruders, but such relief is invariably refused as between adverse claimants to the public domain. We believe there is similarity in principle between such case and the case at bar. In Adams v. Couch et al., 1 Okla., 17, 26 Pac. 1009, the third syllabus reads as follows: 'The land departmnet of the government will not be interfered with by the courts whil eit has charge of any contest proceedings between adverse claimants of the land.' Mr. Justice Seay, who delivered the opinion of the court, after an exhaustive review of the authorities on this question, further says: 'We have no doubt that the manifest intent of the laws of the United States was to invest in the land department exclusive jurisdiction of all questions relating to the sale and disposition of the public lands, up to the time of the issuing of the patent. While we do not wish to be understood as saying that this court, in a proper case, might not, or would

not, grant relief on the prayer of a bona fide homesteader against a mere intruder or trespasser, we are of the opinion that the court under the pleadings of this case has no jurisdiction to eject the defendant."

Upon the authority of the foregoing cases, the judgment of the court below is affirmed. All the Justices concur.

It will be observed from this language that the court assumed that by virtue of the existence of a contest before the townsite commission, the courts were deprived of the ordinary jurisdiction of an ejectment case, and that a suit already started in the court abated by reason of the institution of a contest. This position does not seem to have reason or precedent for a basis. The town lot in question was the subject of a grant by the Cherokee Nation of at least a possessory right; and for years the courts had been entertaining suits based on such grants. Just when the adverse possesion began in the case is not apparent from anything that appears in the opinion. The court evidently went on the theory that it began when the plaintiff got the deed from the Nation, inasmuch as in the body of the opinion it appears that less than three years elapsed from the time the defendant occupied the property to the time of suit, viz: Dec. 1899, to September, 1902. An examination of the decision of Adams vs. Couch 1 Oklahoma P. 17, fails to disclose any marked similarity between the Tynon vs. Hall

case and the Adams v. Couch. In the first place it was a different kind of land. In the second case the jurisdiction of the Interior Department officials was entirely different. In the third place the time when the action was brought in the court with reference to the action of the Interior Department officials was radically different. In the next place the title of plaintiff in the one case was by the ruling of the courts sufficient to maintain ejectment, in the other not, and special jurisdiction was conferred on the Oklahoma officer to hear and determine; no such jurisdiction was conferred on the Indian Territory officers. Section 20, Act May 20, 1890, 26 Statutes at large, page 91, is as follows:

> "That the procedure in applications, entries, contests, and adjudications in the Territory of Oklahoma shall be in form and manner prescribed under the homestead laws of the United States, and the general principles and provisions of the homestead laws, except as modified by the provisions of this act and the acts of Congress approved March first, and second, eighteen hundred and eighty-nine, heretofore mentioned, shall be applicable to all entries made in said Territory, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof.
>
> All persons who shall settle on land in said Territory, under the provisions of the homestead laws of the United States, and of this act, shall be required to select the same in square for mas nearly as may be; and no person who shall at the time

be seized in fee simple of a hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma. The provisions of sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall, except so far as modified by this act, apply to all homestead settlements in said Territory.

Sec. 21. That any person, entitled by law to take a homestead in said Territory of Oklahoma, who has already located and filed upon, or shall hereafter locate and file upon, a homestead within the limits described in the President's proclamation of April first, eighteen hundred and eighty-nine, and under and in pursuance of the laws applicable to the settlement of lands opened for settlement by such proclamation, and who has complied with all the laws relating to such homestead settlement, may receive a patent therefor at the expiration of twelve months from date of locating upon said homestead upon payment to the United States of one dollar and twenty-five cents per acre for land embraced in such homestead."

Section 2273 Revised Statutes, provides for contests; The case of Twine v. Carey, 2 Okla., 251, cited by the court as bearing an another branch of the case, shows clearly that it is based on a special act conferring jurisdiction to entertain a contest, and the case of Couch v. Adams shows that it was decided with reference to special acts conferring jurisdiction, and creating a special tribunal. Coming to the acts of congress on the subject of town lots in the Indian Territory and defining the authority of the Interior De-

partment we must look to the acts concerning the separate Nation or Tribe as the provision applicable to the public lands will not fit. As is well known the Cherokee title was practically a fee simple title, with but few limitations.

Article 2 of the Treaty of 1835 is as follows:

> "The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, in no future time without their consent be included within the territorial limits of jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsisten with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the government of the same."

Pursuant to this authority a constitution was adopted which provides in Art. 1, Section 2 as follows:

> "Sec. 11. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizen of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them."

The Federal Government by the treaty of 1866 clearly recognized the right of individual occupancy, in article three and ten.

The subject of town lots in the Cherokee Nation was first touched on by the Curtis law of 1898. Statutes at Large Vol. 30, P. 501. Section 15 is as follows:

> "Sec. 15. That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek and Cherokee tribes, to consist of one member to be appointed by the executive of the tribe, who shall not be interested in town property other than his home; one person to be appointed by the Secretary of the Interior, and one member to be selected by the town. And if the executive of the tribe or the town fail to select members as aforesaid, they may be selected and appointed by the Secretary of the Interior.
>
> Said commissions shall cause to be surveyed and laid out townsites where towns with a present population of two hundred or more are located conforming to the existing survey so far as may be, with proper and necessary streets, alleys, and public grounds, including parks and cemeteries, giving to eac htown such territory as may be required for its present needs and reasonable prospective growth; and shall prepare correct plats thereof, and file one with the Secretary of the Interior, one with the clerk of the United States court, one with the authorities of the tribe, and one with the town authorities. And all town lots shall be appraised by said commission at their true value, excluding improvements; and separate appraisements shall be made of all improvements thereon; and no such appraisement shall be effective until approved by the Secretary of the Interior, and in case of disagreement by the mem-

bers of such commission as to the value of any lot, said Secretary may fix the value thereof.

The owner of the improvements upon any town lot, other than fencing, tillage or temporary buildings, may deposit in the United States Treasury, Saint Louis, Missouri, one-half of such appraised value; ten per centum within two months and fifteen per centum more within six months after notice of appraisement, and the remainder in three equal annual installments thereafter, depositing with the Secretary of the Interior one receipt for each payment, and one with the authorities of the tribe, and such deposit shall be deemed a tender to the tribe of the purchase money for such lot.

If the owner of such improvements on any lot fails to make deposit of the purchase money as aforesaid, then such lot may be sold in the manner herein provided for the sale of unimproved lots; and when t he purchaser thereof has complied with the requirements herein for the purchase of improved lots he may, by petition, apply to the United States court within whose jurisdiction the town is located for condemnation and appraisement of such improvements, and petitioner shall, after judgment, deposit the value so fixed with the clerk of the court; and thereupon the defendant shall be required to accept same in full payment for his improvements or remove same from the lot within such time as may be fixed by the court.

All town lots not improved as aforesaid shall belong to the tribe, and shall be in like manner appraised, and, after approval by the Secretary of the Interior, and due notice, sold to the highest bidder at public auction, by said commission, but not for less than their appraised value, unless ordered by the Secretary of the Interior; and purchasers may in like manner make deposits of the

purchase money with like effect, as in case of improved lots.

The Act of May 31, 1900, 31 Statutes at Large, page 7, is as follows:

"The Secretary of the Interior may in his discretion appoint a townsite commission consisting of three members for each of the Creek and Cherokee Nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing Act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek or Cherokee Nation a separate townsite commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that Nation. Every such local commission shall be appointed in the manner provided in the Act approved June twenty-eight, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of Indian Territory.'

The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town in

any of said nations at the expense of the town, to survey, lay out and plat the site thereof, subject to his supervision and approval, as in other instances.

As soon as the plat of any townsite is approved, the proper commission shall, with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing Act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise."

The provision of the Cherokee Treaty of July 1 1902, that directly bears on the question as found in 32 U. S. Statutes at Large, page 722, is as follows:

"Sec. 38. The lands which may heretofore be set aside and reserved for townsites upon the recommendation of the Dawes Commission under the provisions of the Act of Congress approved May thirty-first, nineteen hundred (thirty-first Statutes, page two hundred and twenty-one) shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such townsites, not to exceed six hundred and forty acres for each townsite.

"Sec. 29. Whenever any tract of land shall be set aside by the Secretary of the Interior for townsite purposes, as provided in said Act of May

thirty-first, nineteen hundred, or by the terms of this Act, which is occupied at the time of such segregation by any member of the Cherokee Nation, such occupant shall be allowed to purchase any lot upon which he then has improvements other than fences, tillage, and temporary improvements, in accordance with the provisions of the Act of June Twenty-eight, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), or, if he so elects, the lot will be sold under rules and regulations to be prescribed by the Secretary of the Interior, and he shall be fully compensated for his improvements thereon out of the funds of the tribe arising from the sale of the townsites, the value of such improvements to be determined by a board of appraisers, one member of which shall be appointed by the Secretary of the Interior, one by the chief executive of the tribe, and one by the occupant of the land, said board of appraisers to be paid such compensation for their services as may be determined by the Secretary of the Interior out of any appropriations for surveying, laying out, platting, and selling townsites.

Sec. 40. All townsites which may hereafter be set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, under the provisions of the Act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), with the additional acreage added thereto, as well as all townsites set aside under the provisions of this Act having a population of less than two hundred, shall be surveyed, laid out, platted, appraised, and disposed of in like manner, and with like preference rights accorded to owners of improvements as other townsites in the Cherokee Nation are surveyed, laid out, platted, appraised, and disposed of under the Act of Congress of June twenty-eight,

eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), as modified or supplemented by the Act of May thirty-first, nineteen hundred: Provided, That as to the townsites set aside as aforesaid the owner of the improvements shall be required to pay the full appraised value of the lot instead of the percentage named in said Act of June twenty-eight, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five.)

Sec. 41. Any person being in possession or having the right to the possession of any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the Act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), the occupancy of which lot or lots was originally acquired under any townsite act of the Cherokee Nation, and owning improvements thereon, other than temporary buildings, fencing, or tillage, shall have the right to purchase the same at one-fourth of the appraised value thereof.

Sec. 42. Any person being in possession of any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the Act of Congress, approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), the occupancy of which lot or lots was originally acquired under any townsite act of the Cherokee Nations, and not having any improvements thereon, shall have the right to purchase the same at one-half of the appraised value thereof.

Sec. 43. Any citizen in rightful possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase same by paying one-half the appraised value thereof:

Provided, That any other person in undisputed possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase such lot by paying the appraised value thereof.

Sec. 44. All lots not having thereon improvements other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after appraisement, under the direction of the Secretary of the Interior, after due advertisement, at public auction, to the highest bidder, at not less than their appraised value.

Sec. 45. When the appraisement of any town lot is made and approved, the townsite commission shall notify the claimant thereof of the amount of appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, and four months thereafter he shall pay fifteen per centum additional, and the remainder of the purchase money he shall pay in three equal annual installments without interest, but if the claimant of any such lot fail to purchase same or marke the first and second payments aforesaid or make any other payment within the time specified, the lot and improvements shall be sold at public auction to the highest bidder, under the direction of the Secretary of the Interior, at a price not less than its appraised value.

Sec. 46. When any improved lot shall be sold at public auction because of the failure of the person owning improvements thereon to purchase same within the time allowed in said Act of Congress approved June twenty-eight, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), said improvements

shall be appraised by a committee, one member of which shall be selected by the owner of the improvements and one member by the purchaser of said lot, and in case the said committee is not able to agree upon the value of said improvements, the committee may select a third member, and in that event the determination of the majority of the committee shall control. Said committee of appraisement shall be paid such compensation for their services by the two parties in interest, share and share alike, as may be agreed upon, and the amount of said appraisement shall be paid by the purchaser of the lot to the owner of the improvements in cash within thirty days after the decision of the committee of appraisement.

The regulations promulgated by the Interior Department concerning Town Lot contests were as follows:

1. Where there are conflicting applications covering the same lot, the Commission must decide without unnecessary delay to whom they will schedule the lot. The adverse party of parties must at once be notified that their application cannot be considered unless they desire to contest. Advice of this action must either be served personally upon the losing claimants, or by registered mail and evidence of such service filed with the papers. Notice should also be given that contest can only be initiated by filing a formal complaint or petition, properly verified, setting forth the facts which constitute the grounds of contest. This petition must be filed in duplicate within ten days from the service of notice, failing in which the applicant will have forfeited any claims he may have had to the property described.

2. When contests are properly instituted the Commission will forward a copy of the complaint to the contestee, with notice of th e filing and ac-

ceptance of the contest, and that said contestee, should file such answer as he desires to make within ten days.

3. At the proper time, in cases where the issues have been joined, the Commission will fix dates for the hearings and give not less than ten days notice, unless by written consent, signed by both parties, or their recognized attorneys, an earlier date shall be agreed upon.

4. The notices of contest must be served upon both parties by the Commission, using the form prepared for these cases. Proof of persona' service shall be the written acknowledgment of the person served, or on affidavit of the person who served the notice, stating the time, place and manner of service. Notice may be given by publication only where it is shown that defendant cannot be served personally.

5. The commission shall be required to properly note upon all papers filed the date and time of filing.

6. Proper record must be made of all attorneys appearing in behalf of either party, and the Commission must require attorneys to present written evidence of their authority to act, which evidence will be filed with the papers; and thereafter all notices, decisions, etc., will be served upon the attorneys of record.

7. A postponement of a hearing can only be made upon proper applicatio nfor continuance. in accordance with rules 20 and 22 inclusive, of the rules of practice of the United States District Land Office.

8. The Commission will prepare its opinion as promptly as possible, after the trial of every case, making not less than three original copies thereof; serving one upon each party to the contest, and securing their written acknowledgment of the receipt upon the copy retained by the commission, or furnish other evidence of service in

accordance with the rules of practice. The losing claimant will be notified that he shall have the rights of appeal from the judgment of the Commission within ten days from service of notice of such decision, to the Commission of Indian Affairs, and the same time to appeal from the decision of said Commission to the Secretary of the Interior; said appeals to be filed with the Commission. The appellee will be allowed five days from the service to answer same, if he desires.

9. After the filing of the original complaint or petition copies of all answers, affidavits, motions, briefs, appeals, or other papers filed by either party, must be served upon the opposite party by the person filing the same, and evidence of such service must accompany the papers offered for filing or they will not be received.

10. All things not herein explicitly provided in connection with contests before The Townsite Commissions shall be done strictly in accordance with the rules of practice of the United States District Land Office.

DEPARTMENT OF THE INTERIOR,
Washington, August 29, 1904.
Approved: Thos. Ryan, Acting Secretary.

Nowhere in the laws bearing on the subject was jurisdiction conferred on the townsite commission to entertain a contest with reference to a town lot. Nowhere was jurisdiction conferred upon the Secretary of the Interior to decide controverted questions of fact. The Supreme Court of Oklahoma in Tynon vs. Hall relies as authority for the statement that the townsite commission had exclusive jurisdiction largely upon Couch v Adams. That case pertained to Public Lands of the United States and was based on statutes conferring contest deciding power, and it expressly disclaimed the idea of exclusive jurisdiction in the land department. Twine vs. Carey, 2 Oklahoma,

249, referred to in the opinion was a case concerning a town lot. That case is clearly based on the theory that it required a special statute to confer authority on townsite commissioners to entertain contests over public land that was sought to be gotten as town property. It was decided in that case that because the claimant did not advance the contest fees she forfeited her rights. The statute under which that decisio nwas rendered is as follows:

Sec. 7. That the trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day whiel actually employed; and such traveling and other necessary expenses as the Secretary may authorize and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise.

When an examination is had of the Cherokee Treaty of 1902, it will be found that as to allotments of land among the citizens exclusive jurisdiction was conferred upon the commission to the Five Civilized Tribes, Section 22 of the Act being as follows: "Exclusive jurisdiction is hereby conferred upon the commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all

matters relative to the appraisement and allotment of lands." Such jurisdiction was not conferred on the townsite commissioners. In view of the fact that under the provisions of the original treaties, the citizen owner had a lawful claim to improvements placed on the public domain, and in view of the special provisions of the treaty of 1902, section 46, concerning the appraisement of improvements and the Curtis Law of 1898, heretofore quoted, which provided for a court investigation, is it not clear that no jurisdiction exclusive of the courts was ever invested in the townsite commissioners to entertain a contest based on the ownership or value of improvements? If this be true was there not sufficient allegations in the petition to suggest to the court that the rights of plaintiff had been invaded, in view of the fact that the court must take judicial knowledge of the powers of the commissioners.

It is not believed that conclusions of law should be pleaded. Conceding for the sake of the argument that jurisdiction to pass on the matter was conferred, was jurisdiction lawfully exercised? Under the first rule quoted above we find the following: "The petition must be filed in duplicate within ten days from the service of notice, failing in which the appellant will have forfeited any claims he may have had to the prop-

erty described." Rule eight requires notice to the losing claimant, and the time of appeal dates from the service of teh notice. Rule nine provides for service of copies of all notices, etc. By reference to rule 24 of the rules of practice before the land office it appears that notice by registered mail is required to be given of the entry of a decision based on a default as well as any other.

In the present case no notice was given of the decision. Hence the plaintiff never was in default as to appealing to the Secretary. He certainly had a right to rely upon the regulations. If these regulations were not complied with, he certainly did not forfeit his right to the property.

From the allegations of the petition it appears that no hearing was ever had. It further appears therefore that no notice of the decision actually rendered was ever given. Conceding for the sake of the argument that the regulations of the Department were in all things complied with after notice of contest and that authority to hear and determine a contest was conferred, and that the Department could set aside a previous schedule or award, and conceding for the sake of the argument that the townsite commission did not exhaust its authority when the lot was listed to plaintiff, and conceding for the sake of argument that

the plaintiff by not filing answer forfeited a right to a hearing and to notice of the decision and was absolutely in default; what right did the commission have to entertain the contest at the time it did and on the allegations of contest? The petition shows that the lot was listed to plaintiff October 30th, 1903, and that the contest was filed May 9th, 1905, under the regulations the defendant could not file a contest after 10 days had elapsed. In the petition the date of defendant's application and refusal was given as October 30th, 1903, and over a year elapsed before contest. Was not the entertaining of the contest at this time a violation of the law? Again it is a familiar rule that a default only admits facts that all were pleaded. It appears from the petition that the allegations of the contest showed how defendant claimed title, i. e., through John S. Stewart, deceased, by virtue of marrying him, July 13th, 1900, and his ownership at the time of the marriage and possession and having erected improvements thereon. There was a further allegation in the contest petition that Stewart died on February 16, 1901, and that the contestant occupied the premises till about the year 1903, and contestee, the present plaintiff, was holding the premises without authority from the contestant and that contestant owned the same. Measured by the standard required by the Supreme

Court of Oklahoma in the present case, the contest allegations were insufficient to base a judgment on, or to warrant the setting aside of the listing to the plaintiff. Measured by the law the result would be the same. The commissioner smust followe the law. The wording of Section 43 is such as to require actual possession as a condition precedent to a right to schedule, whether the person be a citizen or a non-citizen. In the case of a non-citizen the possession must not only be actual but must be undisputed. Under this provision the commission, nor Secretary had any right to cancel plaintiff's previous filing, as he was a citizen in possession, neither did it have any authority to award the lot to a non-citizen out of possession, such being the rule of law. Why did not the petition show an equitable title in plaintiff, at least sufficient to warrant an inquiry? The lower court assigned public policy as the reason for sustaining the demurrer; the higher court said it followed precedent. If the construction placed on the section as outlined above is correct, under all the decisions, the petition certainly made a case for equitable relief sufficient as against the general demurrer, and contained something more than "vigorous declamation," the name applied to it by the Justice rendering the opinion of the Supreme Court. The rule in Oklahoma both by judicial construction

and statute is that of liberal construction. Section 5655 of Snyder Statutes of Oklahoma is as follows:

> Pleading Liberally Construed.—In the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties.

Section 5670 is as follows:

> Pleading—Presumtions. — Neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading.

The Supreme Court of Oklahoma in other cases has applied the liberal rule in these catters. See Garrett vs. Walcott, 106, P. 848, syllabus to which is as follows:

> 1. Indian — Allotment of Land — Equity Jurisdiction of State Courts:
>
> Courts of equity have jurisdiction after the commission to the Five Civilized Tribes and the Secretary of the Interior have exercised their power and exhausted their jurisdiction, to determine whether by error of law, or through fraud or gross mistake, the Commission and the Secretary have failed to allot land in the Creek Nation to the citizens who, under the law and treaties, was entitled to same, and have assigned it to one who had an inferior right thereto. If the Commission and the Secretary have been induced to cause to be issued a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant may cause such decision to be avoided, and charge the legal title to the lands in the hands of the allottees with his equitable right to it upon the ground that upon the facts found conceded, or established without dispute at the hearing before this special

tribunal, its officers fell into error as to the law applicable to the case, which caused them to refuse to have issued the patent to him and give it to another, or through fraud or gross mistake it fell into a misapprehension of the facts proved before it, which had a like effect.

2. Indian — Allotment of Land — Equity Jurisdiction of the State Courts.

The citizen being entitled by virtue of his improvements to take such land as his allotment or that of his minor children, although having failed with knowledge of the facts to exhaust all legal remedies appellate offered him before the Commission to the Five Civilized Tribes and the Secretary of the Interior, having acted in good faith and there having been no unreasonable delay in invoking the powers of equity for redress, otherwise being entitled to relief, the same will be afforded him.

In Leak vs. Joslin 94 Pacific 694 the Secretary of the Interior had platted a town and in the platting of the town in squaring up a lot a very small wedge shaped fraction in the possession of one party was included in the other party's lot. No attention seems to have been paid to the matter while the property was being platted or listed or at any time whatever, yet this court was liberal enough to hold that the party in possession had a right to get the wedge shaped piece even after patent to the other party. The Secretary's power to plat was everywhere conceded, and no diligence whatever was shown as everybody was bound to take knowledge of the platting. By a decision on a

demurrer the Oklahoma Court reversed the case and remanded it for hearing on the ground that the answer stated a defense to an ejectment suit, based on the patent. In Brooks vs. Garner 94 P. 606, the same court held that where a patent was issued pending an appeal the jurisdiction of the Department was exhausted. The authorities cited there as well as in Leak vs. Joslin certainly seem sufficient to warrant a holding that the petition in the present case would stand as against a general demurrer.

The Oklahoma Supreme Court in Mitchell vs. Bell 120 Pac. 560, a case concerning allotted land in the Cherokee Nation, on appeal from the judgment of the same trial Judge who passed on the demurrer in this case, said an investigation should have been had to see whether a mistake of law had occurred or a gross or fraudulent mistake of facts. The court, however, in thats case evidently thought that the townsite commissioners passed on allotted land matters as well as on town lot questions, as the body of the opinion announces that townsite commissioners had decided the matter. It does not seem to the writer that this court has been very consistent in its rulings on these matters, and that its decisions for that reason are not very safe precedents.

Aside from these considerations as to jurisdiction

or positive requirements of the law, there was in the petition allegations showing accident and mistake, and the court below went upon the theory that the neglect of the plaintiff's attorney was the plaintiff's neglect to such an extent as to deprive him of a right to object to a forfeiture of his property.

The court below says the alleged negligence of his counsel in failing to file his answer within the time prescribed, if such was the case, does not warrant the interference of the court of equity in his behalf in the face of the decision of the townsite commission.

The allegation of the petition is that the plaintiff was in prison in the United States jail at Vinita, at the time papers were served and remained therein over ten days thereafter. The plaintiff at Vinita was something like a hundred miles from Sallisaw. Being thus detained the plaintiff hired an attorney, regularly licensed to practice in Court and before the Department. This attorney was an actual practitioner. There was turned over to him all papers connected with the matter and he was paid him for his services and after so doing he was assured from time to time by the attorney that the necessary pleadings had been filed. Certainly the plaintiff was not guilty of negligence in doing any of these acts. He had a right to believe that a regular licensed attorney and actual

practitioner at Sallisaw, paid for services, having accepted the employment, would look after it.

It was not the case of the employment by the defendant of a private agent. It was the case of employment of an official especially licensed for that purpose.

There are further allegations of a tender of the money required to pay for the lot and of it being retained for a while by the officer whose duty it was to receive as soon as the contest was over and the information came from official quarters that the lot was in litigation.

There is a further allegation that the attorney in February, 1907, made inquiry of the Indian Inspector concerning the contest and was informed that the lot was in litigation and he would be advised as soon as action was taken.

There is a further allegation to the effect that shortly afterwards upon inquiry the Inspector announced that by reason of failure to file an answer within ten days the plaintiff's right to the property had become forfeited and that later a formal decision to that effect would be rendered.

There was a further allegation that no notice whatever was given of the rendition of the formal decision. Does this show any negligence on the part of

the plaintiff? Did he not do what every other reasonable, prudent man would do under like circumstances? Did he not have a right to rely upon his attorney? Did he not have a right to feel assured that no right had been forfeited when he was informed by the party empowered by law to receive the money that the lot was in litigation? Did not his attorney as late as February, 1907, have the right to believe that the answer had been filed, when he was informed by the Indian Inspector, the person having charge of the records and the supervision of the contest that the lot was in litigation and did he not have the right to rely upon the proposition of its being set for hearing and a time fixed for such hearing?

There was an allegation on information and belief to the effect that in due time there had been filed with the Townsite Commission and Indian Inspector an answer and there is a further allegation that the answer showed the defense of the plaintiff thereto, but that the record did not show this.

There is a further allegation that everybody prior to February, 1907, had acted on the assumption that the contest would be set for hearing and all parties notified. Is there anything whatever in these allegations tending to show directly or indirectly, negligence of this attorney?

Is there anything in these allegations tending to show negligence of the plaintiff?

Perhaps it might be said that in the general allegation as to why no further steps were taken to prevent the patents from being issued, there was an implied inference that the plaintiff's attorney had been negligent in that portion of the language used as follows: "By reason of the fact that plaintiff's attorney either failed to file an answer in the contest preceding or that said answer having been filed was disregarded by the Indian Inspector or Townsite Commission." But, it is respectfully urged that in the face of the statement, alleging it was filed, this should not be so construed.

It is not perceived how any reasonable, prudent man can be said to have been negligent in relying upon statements of this kind, in view of the well known fact that after contest proceedings were actually filed, it was sometime a year or two years before they were set for hearing. The court quotes from Twine vs. Carey, 2 Okla., 249, Its decision of Garrett vs. Walcott, quoted above is directly adverse to the doctrine advanced by the court in this case.

In the opinion is a statement, as follows: "He does not allege that the inspector told the plaintiff in error that he disregarded his answer, if in fact he filed

it, or that he only considered the contestee's evidence in awarding the lot, but rests on the broad statements that the Indian Inspector misled him. As against all defects of this kind, a motion to make more definite and certain might perhaps with propriety be made. But on a general demurrer in an Oklahoma Court it seems to the writer that a general allegation was sufficient. It is true that one might continue to multiply statements to the effect that the petition did not say that the inspector told the plaintiff that the inspector disregarded the answer and the only limit to such assertions would be the vocabulary of the person making the assertions, but it is respectfully submitted that the allegation on this bill are sufficient to clearly show that no hearing whatever was ever had, and no opportunity to be heard was ever had, and that the want of an opportunity was not brought about by any failure of the plaintiff or his attorney.

It is further respectfully urged that the facts connected with the dealing of the plaintiff and the Interior department officials are stated in ordinary and plain language leaving such inferences as were natural to be drawn therefrom. In the case of Metcalf vs. Williams, decided by this court in the 104 U. S. and reported in the Lawyers Co-Operative Edition in book 26, page 665, an application was made to set aside a

judgment upon the ground of surprise and being misled by the proceedings. In that case this court said:

> "The circumstances on which the bill relies for setting aside this judgment are, that the complainant does not owe the money, and made arrangement to have the claim properly litigated; that in September, 1877, he employed counsel to appear and plead to the action, that the said counsel, appearing at the clerk's office, was informed by the clerk that it was usual to file the pleas in open court; that when the court came on in October, and before the judgment was entered, the said counsel called the attention of the Judge to the case, and stated that he desired to have entered the plea of nil debet, and to call the attention of the court to some preliminary questions which would have to be settled before a trial could be had on the merits; that the Judge informed him that he had ordered all cases against persons living in the congressional district in which defendant resided to be tried in Alexandria; and that the counsel for plaintiffs were residents of Alexandria and were not then in court, and probably kept away from the knowledge of the fact that this suit under the rule would be tried there; that thereupon the counsel said he would not press the matter further, but would wait until the court commenced its term in Alexandria to have said preliminary questions disposed of; that he supposed that the formal plea of nil debet had been noted by the clerk, it not being usual in the state courts to write out the plea of the general issue, but simply for the clerk to note it on the record. The judgment was afterwards entered without the knowledge of complainant or his counsel. When the court came on at Alexandria, in January following, the complainant's counsel attended for the purpose of trying the cause, and was informed that no plea had been entered on the record at

Richmond, and the case was not on the docket for trial. Being taken by surprise, he moved the court to re-instate the cause upon the docket; but the judge, doubting his authority to do this, refused the motion." — — — — — —

"First, however, it is proper to inquire whether sufficient cause was shown in the bill for setting aside the judgment. It is manifest that the judgment was a surprise upon complainant. After what passed in the court at Richmond, his counsel had a right to suppose that the cause would be tried in the ensuing term at Alexandria. The practice in Virginia as to entering pleas of general issue on the record, sufficiently accounts for the omission to file a formal plea. Had not the term passed by, the District Judge would, undoubtedly, have set aside the judgment, and reinstated the cause on the docket for trial. If, as he supposed, the passage of the term deprived him of power to do this, it became a proper case for equitable interference by bill. When a party has been deprived of his right by fraud, accident or mistake, and has no remedy at law, a court of equity will grant relief."

In Oolagah Coal Co. vs. M'Caleb et al., by the Circuit Court of Appeals for the Eighth Circuit, 68 Federal, page 87, the Court of Appeals seemed to think that an allegation in the alternative about fraud and mistake was good. The language is as follows:

"The allegation is that the license from the Cherokee Nation under which the defendants are acting was issued after the issuance of the licenses to the plaintiff's assignors, and that it was either issued under a mistake of fact, or was obtained through fraud."

Mensure by the case of Durango Land Company v.

Evans, the petition certainly stated a cause of action. In the Durango case Judge Thayer decided that a contest was duly inaugurated. The contest in the case at bar was not duly inaugurated. It was out of time over a year. Due notice and an opportunity to defend existed. Notice of the filing of contest appeared in the present case, but not an opportunity to defend, and the case was never set for hearing. In that case a defense was had. In that case the contest ran its prescribed way. In the present case it did not. The standard laid down calls for fraud or imposition. In the present case the conduct of the officers, if not fraudulent at least was an imposition. Here the false statements of the defendant procured the patent. Plaintiff's case was not fully considered; it was not considered at all. His property was forfeited illegally. His property was also forfeited as a result of accident, if in fact the answer was not filed . It was forfeited as a result of mistake if his answer was filed. His property was forfeited if his answer was not filed, and he was led by the officers to believe it was filed, either by mistake or accident or imposition. If on the showing made by the contestant under the law, the officers made a mistake, it came clearly within the Durango case. The cases cited in that case clearly hold that the petition was not demurable. From the

start the right to the lot under Federal law and procedure was claimed. It is now so claimed, and it is respectfully asked that the actions of the lower courts be reversed and the cause be rendered for hearing.

Respectfully submitted,

W. H. KORNEGAY,

Attorney for Plaintiff in Error.

INDEX

	Pages
Argument	10 to 27
Assignment of Errors by Plaintiff in Error	9
Statement	1 to 9

Cases Cited

	Pages
Wood v. Carpenter	11
Ballard on Real Property	11
Durango Land & Coal Co. v. Evans	16
Lee v. Johnson	18
Quinby v. Conlan	18
Marquez v. Frisbie	18 and 21
Vance v. Burbank	18
Smelting Co. v. Kemp	18
Moore v. Robbins	18
Shepley v. Cowan	18
Johnson v. Towsley	18 and 25
Sanford v. Sanford	18 and 21
Leek et al. v. Joslin	23
Lytle et al. v. State of Arkansas	24
Twine v. Carey	25
Will Borne v. Baldwin	25
Thornton v. Perry	25
Payne v. Foster	25
U. S. v. Maxwell Land Grant Co.	26

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1912.

No. 140.

CHARLES L. ROSS, *Plaintiff in Error,*

vs.

MINERVA STEWART, *Defendant in Error.*

BRIEF *of* DEFENDANT *in* ERROR

Statement

As the plaintiff in error has not copied in full the amended petition in his brief, the defendant in error makes a complete copy of same, and notes disposition of same, which is as follows:

> *"In the District Court for Sequoyah County, State of Oklahoma, June Term, A. D. 1908.—Charles L. Ross, Plaintiff,* v. *Minerva Stewart, Defendant.*
>
> AMENDED PETITION
>
> Plaintiff, by leave of court for amended petition, says:

That he is a citizen by blood of the Cherokee Nation, and was such citizen during all the times hereinafter mentioned, and the defendant, Minerva Stewart, was not a citizen of said Nation at any time; and that she resides in Sequoyah County, and the land involved in this suit lies therein, and is Lot 7 of Block 39 in the town of Sallisaw.

That said lot lies in the townsite laid off by the Secretary of the Interior, and is a lot that was purchasable under the provisions of section 43 of the Cherokee Treaty of the year 1902; that at the time of the passage of said treaty and at the time of the appraisement of town lots in said town, this plaintiff was in the undisputed possession of said lot and owned the improvements thereon, and had been in such possession and had such ownership for nearly a year prior to the adoption of said treaty and continuously thereafter to the present time; and that the improvements on the lot were valuable and consisted of a two-room dwelling house, fencing and out-buildings of the value of Five Hundred ($500.00) Dollars.

That on the thirtieth (30th) day of October, 1903, this plaintiff made application to the Townsite Commission for the Town of Sallisaw, Cherokee Nation, to have the said lot listed and appraised and scheduled to him, and it was accordingly listed, appraised and scheduled to him.

That thereafter, on October thirtieth (30th), 1903, the defendant, Minerva Stewart, made application to have said lot scheduled to her; in said application representing that she was in possession of said lot, which representa-

tion was untrue; and also represented in said application that she owned the right of occupancy of said lot, which representation was untrue.

That her application was refused, and that thereafter, on the 9th day of May, 1905, she filed with the Townsite Commission or the Indian Inspector, a complaint in contest against this plaintiff, alleging that at the time of the filing of this complaint she owned said lot, which allegation was untrue, and alleging also that she was entitled to possession of said lot, which allegation was untrue, and alleged further that on Jnauary 13th, 1900, she was married to John S. Stewart, deceased, and at said time he owned and was in possession of said lot and had built on said lot a dwelling house, dug a well and erected other improvements, all being of the value of Five Hundred ($500.00) Dollars.

That, in fact, at such time said John S. Stewart did not own any of the improvements and did not own the lot and the occupancy of such improvements, and the lot by him was held under Martha A. Snow, plaintiff's grantor, in the capacity of tenant to said Martha A. Snow; and in said contest it was further alleged that said John S. Stewart died February 16th, 1901, and that the contestant occupied the premises until about the year 1903; and it was further alleged in said contest complaint that the plaintiff herein was holding the premises without authority from the contestant, and that contestant owned the same. That the allegation as to her individual ownership was not true.

That at said time, the plaintiff was imprisoned in the United States jail at Vinita, and notice of such filing requiring an answer in 10 days was served upon him therein, and notice was therein accepted by him over ten (10) days before his discharge, and that upon receipt of said notice he employed J. G. McCombs, attorney, of Sallisaw, Indian Territory, regularly licensed to practice in the United States Courts in the Indian Territory and regularly licensed to practice in the Interior Department and actively engaged in practice before said courts and before said department, and that he turned over to said attorney all his papers connected with said matter, and he paid said attorney for his services, and was assured by said attorney that all things necessary to protect plaintiff's rights would be done, and from time to time thereafter he was assured by said attorney that the necessary pleading had been filed and the contest would be later held and the evidence of both parties would be heard.

That on the 21st day of June, 1906, he tendered to the United States Indian Agent at Muskogee, J. Blair Shoenfelt, the full amount of the payment that would be due from him to the Cherokee Nation for said lot, and said payment was credited by said Indian Agent on the 26th day of June, 1906, and was later refused because the lot was in litigation and said money was held for some time and finally returned to await the result of the litigation; that again on June 3, 1907, a tender was made and refused because the lot was, by the Indian Agent, alleged to be in litigation, and later tender was made in person by this plaintiff to said Indian Agent and the same was refused because prop-

erty had been awarded to the defendant, Minerva Stewart, as alleged by said Indian Agent.

That in February, 1907, plaintiff's said attorney made inquiry of the Indian Inspector for the Indian Territory concerning said contest and was informed that the lot was in litigation and he would be advised as soon as action was taken, and that later in said month, on inquiry of said inspector, he was informed by him that because defendant did not within ten (10) days of service of the complaint in contest file answer thereto, he had forfeited all claims to the property and that it was the intention of the office to render formal decision relative to his rights after the first of the succeeding month; that under the rules prescribed by the Secretary of the Interior it was necessary to serve the plaintiff or his attorney with a copy of any decision after its rendition, and of his right to appeal.

That no notice was ever given to plaintiff or to his attorney, of the rendition of such decision, though plaintiff is informed that on October 8, 1907, patent was approved to Minerva Stewart to said lot. That the said Minerva Stewart never owned any improvements on said lot and was not in possession in any form of said lot at the time of filing by plaintiff or thereafter. Further, that she was dispossessed by the United States Marshal in the year 1902, about May 5, and that prior to said time she was never in possession except as the wife of John S. Stewart, whose possession during the time she was his wife was that of a tenant of Martha Snow, hereinafter mentioned.

That on the 5th day of May, 1902, in a cer-

tain suit Number 837, wherein said Minerva Stewart was plaintiff and said Martha A. Snow was defendant, pending in the United States Court for the Northern District of the Indian Territory at Wagoner, a judgment was duly given and rendered by the United States Court aforesaid, in favor of Martha Snow and against the said Minerva Stewart, for the recovery of the improvements and the lot involved therein, and by said judgment the claim of said Minerva Stewart to said lot was forever barred.

That about the close of the year 1902, the plaintiff succeeded to all the rights of Martha Snow to said lot and improvements and she made him a Bill of Sale thereto, but it has been lost and the copy thereto is not set out. That at said time said Martha Snow owned the improvements.

That in the suit aforesaid concerning the said lot and improvements, the title of Martha Snow was deraigned from the John S. Stewart mentioned in the contest hereinafter referred to under conveyance of November 16, 1899, and all these things were well known to the defendant at the time of the institution of the contest.

That this plaintiff is informed and believes that his said attorney had in due time filed with the Townsite Commission and the Indian Inspector an answer to the contest proceedings stating the defenses of the plaintiff thereto, but the record of the case does not show this and said answer cannot be found in the files, but all parties thereto prior to the notification in February, 1907, acted on the assumption that a day would be set for the hearing and the evi-

dence of all parties introduced. The plaintiff stands ready and willing to pay defendant any amount she may have paid that this plaintiff should have paid to the Cherokee Nation for the title to said lot, together with the legal interest thereon, if on the hearing it shall be ascertained that there is anything due her.

That by reason of the misrepresentation of the defendant as aforesaid, and by reason of the fact that plaintiff's attorney either failed to file an answer in the contest proceedings, or that said answer having been filed was *disregarded* by the Indian Inspector or the Townsite Commission, and by reason of the action of the Indian Inspector in misleading the plaintiff and by reason of plaintiff believing that his defense was actually filed, this plaintiff did not take further steps to prevent the patent from being issued to the defendant.

And for the further reason that he had no notice whatever that the Indian Inspector or the Townsite Commission had ever rendered any judgment forfeiting his rights until the patent was actually issued. That under the complaint in contest the officers of the Interior Department were not authorized to set aside the scheduling to the plaintiff of the lot. That said complaint did not show that the defendant, Minerva Stewart, was entitled to said lot under the law, and said officers under said complaint had no authority to judge that she was so entitled or to cancel the scheduling of said lot to said plaintiff, and under the showing made the said officers had no right to issue a patent to the defendant, Minerva Stewart, and the said Minerva Stewart well knew that she had no right to receive same.

That the officers of the Interior Department had no right by law to forfeit plaintiff's right to said lot and to schedule lot to defendant without hearing. That by reason of the mistakes of said officers and by reason of the plaintiff being misled, and by reason of the disappearance from the files, or failure of plaintiff's attorney to file answer, and by reason of the fact that improvements on the lot belonged to the plaintiff at the time of the passage of the Cherokee Treaty; and by reason of the fact that he was in the undisputed possession of them at said time, as well as at all times thereafter, this plaintiff is the equitable owner of the land in question, and in equity and good conscience the legal title to said land belongs to the plaintiff and not to the defendant, Minerva Stewart, who has procured a patent therefor in the manner hereinbefore recited; and the premises considered, the plaintiff asks:

That the title of the defendant be decreed to belong to the plaintiff, and that the defendant be required to make a deed to the plaintiff of the lot in controversy, and that in the event this is not done, a decree be entered vesting the legal title to the lot in the plaintiff and divesting the defendant of the title thereto, and that the plaintiff to have and recover his costs herein laid out and expended, and that the plaintiff do have all other and further relief, to which in equity and good conscience he may be entitled.

(Signed) CHARLES L. ROSS.

By W. H. KORNEGAY, *His Attorney.*

State of Oklahoma, County of Sequoyah—ss.

I, Charles L. Ross, on oath do say that the statements of the foregoing petition are true as I verily believe."

The defendant in error filed a general demurrer to the petition in the court below, which demurrer was on the 15th day of June, 1908, sustained, to which the plaintiff in error excepted and assigns the following as errors:

1st. The court erred in sustaining the demurrer to the plaintiff's petition as amended.

2nd. The court erred in adjudging that the plaintiff take nothing by reason of his suit.

3rd. The court erred in adjudging that the defendant recover cost of and from the plaintiff.

ARGUMENT

The question is, did the court err in sustaining the demurrer to the plaintiff's petition as amended? We contend that it did not. It will be seen by reading the amended petition, it recites that on the 9th of May, 1905, the defendant in error filed with the Townsite Commission or the Indian Inspector a complaint in contest against the plaintiff in error alleging that at the time of the filing of the complaint she owned the lot in controversy, and that she was entitled to possession of the lot; that on January 13, 1900, she was married to John S. Stewart, who built a dwelling house, dug a well and made other improvements of the value of $500.00; that the contestant occupied the premises until about the year of 1903; that the plaintiff in error, who was the contestee therein, was holding the premises without authority from the contestant, and that the contestant owned same.

It is further alleged that at the time the contest was filed, the contestee was imprisoned in the United States jail at Vinita; that notice of the filing of the contest and requiring an answer to be filed within ten days, was served upon the contestee; that notice was accepted by the contestee, and that he employed an attorney, J. G. McCombs, and turned over to his attorney all his papers connected

with the matter, and he paid his attorney for his services and was assured by his attorney that all things necessary to protect his rights would be done, and from time to time thereafter he was assured by his attorney that the necessary pleadings had been filed and the contest would be held and evidence heard; that in February, 1907, his attorney made inquiry of the Indian Inspector concerning the contest and was informed that the lot was in litigation and that he was later informed by the inspector that because he did not within ten days of the service of the complaint in the contest, file an answer, he had forfeited all his rights and claims to the property, and it was the intention of the officer to render a formal decision after the first of the succeeding month. The defendant in error claims that by the above admissions the plaintiff in error places himself in a position where the court could not grant the relief prayed; that is to say, he admitted his negligence in failing to file his answer within the time prescribed, and he cannot therefore take advantage of his laches. (See *Wood* v. *Carpenter*, U. S. Supreme Court Reports, vol. 101, page 807, 25th Lawyers' Edition, page 807; Ballard on Real Property, vol. 3, pages 700-703-6, sec. 588.)

The plaintiff in error further states in his amended petition that by reason of the misrepresentation of the defendant, and by reason that the plaintiff's attorney failed to file his answer in the

contest, or having filed it, it was disregarded by the inspector or the Townsite Commission, and by reason of the Indian Inspector misleading him and by reason of his believing that his defense was filed, that he did not take further steps to prevent the patent from being issued. He does not set out what the alleged misrepresentations were, which the defendant in error thinks is essential in order to convict her or the Indian Inspector of fraud or imposition; neither can we admit that because his attorney failed to file an answer as required by law, will in the least way excuse him from performing the duty which the law enjoins. As to whether his answer was disregarded by the inspector, if filed, we think such allegation a mere assertion and conclusion and not sufficiently pleaded.

He does not say the inspector told him he disregarded his answer, if in fact he filed it, or that he only considered the contestant's petition and evidence, in awarding the lot, but makes the broad statement that the "*Indian Inspector misled him.*"

He further pleads that believing his defense was actually filed, he did nothing further to prevent the patent from being issued. We contend that this is another act of carelessness and the laches should bind him the tighter. If it were the law that the belief of litigants in reference to the lawsuits, after cases have been decided adversely to their interest, could come in and set up their belief as fraud upon the court or adversary, there would be no end to

litigation, therefore, the just provision of diligence, in the absence of which laches prevail.

He pleads that he had no notice that the Indian Inspector or Townsite Commission had ever rendered judgment, forfeiting his right, until after the patent had issued. It is well known that such officials do not have a retinue of men to carry the news of their decisions and rulings to contesting parties, but frequently mail copies of their decisions to litigants or their attorneys, when address is known, or publish same, and their records and decisions are open to the public and especially to litigants. Had he plead that he relied upon the Indian Inspector to serve him with a copy of his decision and by his failure to do so, he was mislead and prevented from appealing, then probably the defect would have been corrected, but it comes with poor grace when he is not sure that his answer was filed, for him to say, notice was not given to him nor his attorney—it might have been published. For all the court knows, he intentionally avoided service. He should have alleged "No notice was given."

The amended petition further recites that, under the complaint in the contest, the officers of the Indian Department were not authorized to set aside the scheduling to the plaintiff. How does this court know, or how did the lower court know? The contestant's petition is not set out in the amended petition to which the lower court sustained the demurrer, neither did he plead the necessary requisite,

but he does plead that the contestant filed her contest proceedings on the 9th day of May, 1905, alleging that she owned the lot and improvements of the value of $500.00; that she was entitled to possession of same, and that the contestee was holding without authority. As it is not shown all that was alleged or what was necessary to allege, we submit that the above was a fair stagger, taking into consideration that the findings of the inspector were in her favor.

The amended petition further alleges "that said complaint did not show that the defendant, Minerva Stewart, was entitled to said lot under the law and said officer under said complaint had no authority to judge that she was so entitled or to conceal the scheduling of said lot to said plaintiff, and under the showing made the said officers had no right to issue a patent to the defendant, Minerva Stewart, and said Minerva Stewart well knew that she had no right to receive same."

Let's see, the argument just presented covers the point—the entire petition was not set out, or the requisite, nor just what showing was made, in the absence of which, how could the court know, other than the mere conclusion of the pleader?

The amended petition states further, "That the officers of the Interior Department had no right by law to forfeit the plaintiff's rights to said lot and to schedule the lot to defendant without a hear-

ing." We challenge this statement as being another conclusion; if it were not, it has been shown that he had due notice of the contest; that he was served with copy of contestant's petition and warned to answer within ten days, and to this good day, he is not sure whether he filed an answer, and if not, he is presumed to have waived it. Could negligence and delay be more patent? Should the court award him for his own carelessness? If he is uncertain about things so material to his case, it is probable that the court is more so.

The amended petition further alleges, "That by reason of the mistake of said officer, and by reason of the plaintiff being mislead, and by reason of the disappearance from the files or failure of plaintiff's attorney to file answer, and by reason of the fact that improvements on the lot belonged to plaintiff at the time of the passage of the Cherokee Treaty, and by reason of the fact that he was in the undisputed possession of them at said time, as well as at all times thereafter, this plaintiff is the equitable owner of the land in question, and in equity and good conscience, the legal title to said land belongs to the plaintiff and not to the defendant, Minerva Stewart, who has procured a patent therefor in the manner hereinbefore recited." It seems to us like the above is only a condensation or summary of the entire petition, and while it might have been proper before the contest department, is improperly plead here, and as we have assigned our

reasons to each paragraph, as to why we think it bad pleading—additional would be cumulative.

The plaintiff in error prayed that the title of the defendant in error be decreed to belong to the plaintiff in error; that defendant in error be required to make a deed to the plaintiff in error conveying the lot in controversy and in the event that it is not done, a decree be entered vesting the legal title in the lot to the plaintiff in error and divesting the defendant in error of her title, and that he have judgment for his costs, etc. In order to grant his prayer, he must have sufficiently alleged fraud, imposition or mistake.

1st. The defendant in error claims that the allegations in the amended petition are only conclusions of the pleader, and not surrounded by a sufficient detail of facts to justify such conclusions.

2nd. The plaintiff in error, in our opinion, has not stated sufficient facts in his amended petition that would excuse him from failing to file his answer as required by law before the Townsite Commission or Indian Inspector, and from failing to take his appeal after the decision rendered against him, it would constitute laches, and because of these reasons the defendant in error contends that the amended petition is fatally defective and the court below did not err in sustaining the demurrer. (See *Durango Land & Coal Co.* v. *Evans et al.*, 80 Fed-

eral 425, and citations.) We quote from the above decision as follows:

> "The allegations in the bill respecting these proceedings in the land department are very vague and unsatisfactory. The bill simply advises us that Evans filed an affidavit in the local land office at Leadville on June 27, 1892, charging that the entry by McMaster was not made for his own use, and that he (Evans) subsequently obtained a patent for the land in controversy. The further course of the proceeding before the land department, after the affidavit was filed, is not described with any detail or certainty, and but for a casual allusion, made in brief of counsel for the appellant, to a decision rendered by the Secretary of the Interior, we should be in doubt whether the contest ever reached the Secretary, or was terminated by the decision of some inferior officer of the Land Department. Enough appears, however, to justify us in presuming, as against the complainant company, that a contest was duly inaugurated by Evans against said Company; that it had due notice of Evans' claims, and opportunity to defend; that it did defend; that the contest ran its course in the prescribed way through the department until it reached the Secretary of the Interior; and that a patent was ultimately awarded to Evans. Viewed in this aspect, the case at bar is one in which the complaint seeks to set aside and impeach the judgment of the Land Department; and the doctrine is too well settled to admit of any controversy that the decisions of that tribunal upon questions properly pending before it can only be annulled when such fraud or im-

position is shown to have been practiced as prevented the unsuccessful party in a contest from fully presenting his case, or the officers composing the tribunal from fully considering it, or when such officers have themselves been guilty of fraudulent conduct, or when it is made to appear that, upon the case as established before the Land Department, the law applicable thereto was misconstrued or misapplied. If fraud is charged as a ground for annulling a decision of the Land Department, it is not enough that false testimony or forged documents have been employed; but it must be made to appear that such false testimony has affected the decision, and led to a result which otherwise would not have been reached. And, inasmuch as the findings of the Land Department on questions of fact are conclusive, when the charge is that the Land Department has erred in the decision of a mixed question of law and fact, what the facts were, as laid before the court to see clearly that the law has been misconstrued.

These propositions have been so frequently stated and applied that it is hardly necessary to repeat them. (*Lee* v. *Johnson,* 116 U. S. 48, 50, 6 Sup. Ct. 249; *Quinby* v. *Conlan,* 104 U. S. 420, 426; *Marquez* v. *Frisbie,* 101 U. S. 473, 476; *Vance* v. *Burbank,* 101 U. S. 514, 519; *Smelting Co.* v. *Kemp,* 104 U. S. 636, 640; *Moore* v. *Robbins,* 96 U. S. 530; *Shepley* v. *Cowan,* 91 U. S. 330, 340; *Johnson* v. *Towsley,* 13 Wall. 72; *Sanford* v. *Sanford,* 139 U. S. 642, 11 Sup. Ct. 666). Tested by these rules, we think the allegations of the bill were insufficient to warrant the relief prayed for and that the demurrer thereto was properly sustained. Turn-

ing, then, to the allegations of the bill which attempt to show that the decision of the Land Department was procured by fraud and imposition, it will be observed that the only fraudulent acts alleged are that certain affidavits were filed in the land office by Evans and his associates, alleging that Evans had expended money in developing coal mines on the land in controversy; that he was in actual possession of the lands at the time; that he made his alleged entry for his own use; and that all of such statements contained in the affidavits were false.

Aside from a general allegation of conspiracy among the defendants to FRAUDULENTLY and unlawfully obtain a patent for the lands in dispute, the foregoing are the only specific fraudulent acts which the bill charges or describes; but, obviously, the issues tendered by these affidavits were the very issues which the Land Department was appointed to try and determine, and they were each issues of fact, concerning which the finding of the Land Department is final and conclusive, unless such finding was induced by fraud. In the contest pending before the Department, the complainant company had an opportunity to show, as it now contends, that all the aforesaid statements were false; and, within the doctrine above stated, it was its duty to have made such showing before the Land Department, and it will not be excused for failing to do so unless it alleges and proves that some trick or artifice, or deceit was practiced, which prevented it from obtaining a full and fair trial of the issues, or which prevented the officers of the Land Department from considering the

same, and reaching a proper decision. It must be apparent, we think, from a careful reading of the complaint, that no such fraud is alleged, and that, if the Circuit Court had entered upon a hearing of the issues presented by the bill, it would simply have retried the very case which was tried by the Land Department.

The question whether the bill discloses that, upon the case as presented to the officers of the Land Department, those officers misconstrued or misapplied the law, remains to be noticed. A fundamental defect in the bill in this respect is that it fails to set out the evidence which was laid before the Land Department, or to state what the department found the material fact to be, in such a manner that the court can separate the department's findings of fact from its conclusions of law, and see clearly wherein a mistake of law has been made. It is alleged in one paragraph of the bill, 'that there was no evidence before the said Land Department at said hearing or contest showing that the said entry of the said McMaster was unlawful or invalid in any respect, and that there was no evidence in said pretended contest upon which the said pretended entry of the said Evans should or could legally have been allowed.' These allegations, however, merely state the opinion of the pleader with reference to the evidence which was laid before the department, and for that reason they are merely conclusions of law. To enable a court to decide whether the conclusions so stated are right or wrong, all the testimony with respect to which the aforesaid opinion is expressed should have been set out, inasmuch as the question whether there is any evi-

dence tending to establish a given fact is a question of law, which can only be determined after all the testimony has been considered and examined. These allegations are made without any apparent reference to the contest before the Land Department, or to the evidence with respect to such allegations which may have been laid before the department in the course of the contest, or to the findings of the department with respect thereto. The allegations are made precisely as they might be if the issues tendered were open to consideration in the case at bar, entirely unaffected by the findings and decision of the Land Department. This theory is erroneous. The contest having been tried and determined before a special tribunal constituted for that purpose, its judgment can only be overturned for errors of law, by showing that it misconstrued or misapplied the law applicable to the case made before the Land Department, and the bill of complaint does not advise us what evidence was produced before the department relative to Evans' qualifications to enter coal lands, or relative to his acts of abandonment. This court cannot say that the law was misconstrued by the officers of the Land Department, unless their findings upon questions of fact are disclosed, or enough undisputed facts are disclosed, which were proven before the department, to make it plain that an error of law was committed, and that the complainant company was thereby deprived of its rights. (*Marquez* v. *Frisbie,* 101 U. S. 473, 476; *Sanford* v. *Sanford,* 139 U. S. 642, 647; 11 Sup. Ct. 666.) No decision by the Land Department will have any weight or afford any protection to the successful litigants in that

department, if, without any statement of what the facts were as presented to the department, the whole controversy could be opened in the courts by general allegations, such as are found in the present bill, that the successful litigant had exhausted his right to enter land, or was otherwise disqualified, or had abandoned his entry. These are matters which were properly cognizable before the Land Department when the contest was pending. The presumption is that all such questions were brought to the attention of the department, and were duly considered and properly decided. The burden was on the complainant, therefore, when it sought to reopen the controversy for errors at law, to show what the facts were before the Land Department to which the law was applied. We are forced to conclude that, by the averments of the present bill, this burden was not sucessfully discharged."

The opinion concludes:

"It finally contended that the action of the Land Department in cancelling the McAlester entry and in granting the patent to Evans, was void, because the bill shows that no notice of the contest which was inaugurated by Evans was given either to McAlester, or Bell, or Bell's lessee. It is worthy of comment that the bill contains no direct averment that the complainant company had notice of the contest, but, in view of its failure to allege that no such notice was given, it must be presumed that it was duly notified of the proceedings in question; that it took an active part therein; that it had full opportunity to assert before the Land Department all the defenses against the Evans

entry which it now makes; and that it was eventually defeated. Under these circumstances, we are of the opinion that the action of the Land Department in cancelling the McAlester entry is binding upon the complainant, unless such action is successfully assailed for fraud or mistake of law, notwithstanding the fact its predecessors in interest who had parted with all their title to the land in dispute, were not notified of the pending controversy. It results from these views that the demurrer to the bill was properly sustained and the decree of the Circuit Court is therefore affirmed."

It will be seen, by referring to the volume containing the above decision, that the bill is copied and, in our opinion, was a much stronger petition than the one under consideration.

We notice that the counsel for the plaintiff in error has cited an Oklahoma case *(Leek et al.* v. *Joslin,* 94th Pac. p. 518), but, on careful reading of the bill in that case, it will be seen that the Townsite Commission for the City of Wagoner attempted to take from Leek a part of her lot and give it to Joslin, which was done without notice to either of the parties. In other words, the Commission, without a contest or proceeding of any kind, and of their own motion, took a part of the Leek enclosure and gave it to Joslin. This shows unquestionably the mistake of law by the Townsite Commission. Leek accounts for her laches, if any, by showing that she was ignorant and uneducated,

and that she had no knowledge of the actions of the Townsite Commission until about sixty days prior to filing her bill. The case under consideration and the *Leek-Joslin* case differ in that, in the *Leek-Joslin* case, the Townsite Commission, without any proceeding of any kind so far as the parties were concerned, attempted to take from one and give to the other, whereas, in the case under consideration, the contest was filed, notice served requiring the contestee to answer within ten days, which he neglected and failed to do. We do not think the case of *Brooks* v. *Garner*, also cited, is analagous to the one under consideration. The facts are entirely different, but it will be seen on page 699, the court recognizes a well established rule, and quotes from *Lytle et al.* v. *State of Arkansas*, 9 How. (U. S.) 314, 333, 13th L. ed. 153, as follows: *"It is a well established principle that where the individual in the prosecution of a right does everything which the law requires him to do,* and he fails to attain his rights by the misconduct or neglect of public officers, the law will protect him." Under the plaintiff in error's petition, can the court say that he did everything which the law required him to do? We are aware of the fact that the point under consideration has been passed upon by a great many different courts, but it will be seen in all of the decisions bearing on the point, that the Land Department to which cases are usually referred, are first clothed with jurisdiction to try and

determine same, with the right of appeal, usually to the Commission of Indian Affairs, and then to the Secretary of the Interior; that the losing party must exhaust all his remedies before the different departments before the courts will intervene, and then, only, where fraud, imposition or mistake has occurred, and in no instance have we been able to find where the courts have varied the rule. The Supreme Court of the Territory of Oklahoma has passed on this question and held in accordance with the above views. (See *Twine* v. *Carey*, 2 Okla. Rep. 249; *Will Borne* v. *Baldwin*, 5 Okla. Rep. 265; *Thornton* v. *Perry*, 7 Okla. Rep. 441; *Payne* v. *Foster*, 9 Okla. Rep. 213.)

The leading case on the question before the court is probably *Jahnson* v. *Towsley*, (U. S. Sup. Court Reports) L. ed. vol. 20, p. 485, in which it is held "that where officers of the Land office decide controverted questions of fact, in the absence of fraud, imposition or mistake, their decisions on these questions are final, except as they may be reversed of appeal in that department."

The counsel for the plaintiff in error has cited and quoted from 143 Fed. Rep., p. 720, which holding is in accordance with authorities we have cited, the only difference being the established facts. If the plaintiff in error had sufficiently set forth the error of law, fraud or mistake of facts, the case cited would be in point; in other words, the shoe

does not fit the foot. The counsel for the plaintiff in error also attacks the authority of the Townsite Commission and Indian Inspector to pass upon contested cases, but we rely upon Acts of Congress, cited in this brief, which we think fully clothed the Townsite Commission or the Indian Inspector with full authority.

Before concluding, we desire to call the court's attention to the case of *United States* v. *Maxwell Land Grant Co. et al.*, 121 U. S. 946, which says:

> "The respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of stability of titles depending upon these officials' instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not admitted that the titles by which so much property in this country, and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

Therefore, the defendant in error, for the reasons above stated, and for the further reasons presented by the Supreme Court of the State of Oklahoma (see pp. 17 to 24, inclusive, of transcript of record), respectfully submits that the court below did not err in sustaining the demurrer to the amended petition, and the judgment of the lower court should be affirmed.

JOSEPH C. STONE,
Attorney for Defendant in Error.

CHARLES G. WATTS,
JESS W. WATTS,
Of Counsel for Defendant in Error.